DOCKET

(SHOW) PROCEEDINGS AND ORDERS DATE: 120987

CASE NBR 86-1-00987 CFX
SHORT TITLE Haig, Alexander, et al. DOCKETED: Dec 15 1986
  VERSUS Bissonette, Gladys, et al.

Date	Proceedings and Orders
Dec 15 1986	Petition for writ of certiorari filed.
Dec 29 1986	Order extending time to file response to petition until January 27, 1987.
Dec 29 1986	The above extension applies to all respondents.
Jan 27 1987	Brief of respondents Gladys Bissonette, et al. in opposition filed.
Jan 28 1987	DISTRIBUTED. February 20, 1987
Feb 23 1987	Petition GRANTED.
	**********
Mar 31 1987	Order extending time to file brief of petitioner on the merits until May 8, 1987.
Apr 16 1987	Order extending time to file brief of petitioner on the merits until May 23, 1987.
May 14 1987	Record filed.
May 14 1987	Certified copy of original record and proceedings

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 120987

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Date	Proceedings and Orders
May 14 1987	Certified copy of original record and proceedings received, 2 volumes.
May 22 1987	Joint appendix filed.
May 22 1987	Brief of petitioners Alexander Haig, et al. filed.
Jun 27 1987	Order extending time to file brief of respondent on the merits until July 15, 1987.
Jul 20 1987	CIRCULATED.
Jul 14 1987	Brief of respondents Gladys Bissonette, et al. filed.
Aug 31 1987	SET FOR ARGUMENT. Wednesday, November 4, 1987. (4th case).
Oct 13 1987	Reply brief of petitioners Alexander Haig, et al. filed.

PETITION FOR WRIT OF CERTIORARI

86-987

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

BARBARA L. HERWIG
MARC JOHNSTON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the violation of a federal statute, without more, may render unreasonable an otherwise reasonable seizure and thereby give rise to a Fourth Amendment claim under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

2. Whether a purported violation of the Posse Comitatus Act, 18 U.S.C. 1385, without more, gives rise to a Fourth Amendment claim under *Bivens*.

PARTIES TO THE PROCEEDING

Petitioners are Alexander Haig, Richard G. Kleindienst, Joseph T. Sneed, Charles D. Ablard, Joseph H. Trimbach, Ralph E. Erickson, Harlington Wood, Jr., Kenneth Belieu, Roland Gleszer, Edmund Edwards, John Hay, and Volney F. Warner. The respondents are Gladys Bissonette, Ellen Moves Camp, Eugene White Hawk, Marvin Ghost Bear, Edgar Bear Runner, Oscar Bear Runner, Severt Young Bear, Rachel White Dress, Helen Red Feather, Eddie White Dress, Vicki Little Moon, Madonna Gilbert, Lorelei Means, and Carla Blakey.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Alexander Haig, Richard G. Kleindienst, Joseph T. Sneed, Charles Ablard, Joseph H. Trimbach, Ralph E. Erickson, Harlington Wood, Jr., Kenneth Belieu, Rolland Gleszer, Edmund Edwards, John Hay, and Volney F. Warner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals en banc (App., *infra*, 1a-14a) is reported at 800 F.2d 812. The opinion of the panel (App., *infra*, 15a-33a) is reported at 776 F.2d 1384. The opinion of the district court dismissing the complaint (App., *infra*, 34a-38a) is un-

reported. An earlier opinion of the district court (App., *infra*, 39a-58a) is reported at 539 F. Supp. 552.

JURISDICTION

The judgment of the court of appeals en banc (App., *infra*, 59a) was entered on September 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Posse Comitatus Act, 18 U.S.C. 1385, provides:

> Whoever, except in cases and under circumstances authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

STATEMENT

1. On February 27, 1973, an armed group of Indians occupied the village of Wounded Knee, South Dakota, on the Pine Ridge Reservation. Shortly after the occupation began, members of the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Indian Affairs Police sealed off the village by establishing roadblocks at

all major entry and exit roads. The standoff between the Indians and law enforcement authorities ended about ten weeks later with the surrender of the Indians occupying the village. App., *infra*, 16a.

2. In February 1975, respondents, most of whom were residents of the Pine Ridge Reservation at the time of the occupation, brought this action in the District Court for the District of Columbia, alleging that petitioners, who were at that time military personnel or federal officials, had conspired to seize and assault them and to destroy their property, in violation of several constitutional and statutory provisions. Respondents' principal claim was that petitioners' use of military personnel to assist the law enforcement efforts at Wounded Knee violated the Posse Comitatus Act, 18 U.S.C. 1385, as well as a purported constitutional right—arising from that statute—to be free from the use of the military in the enforcement of civil laws. App., *infra*, 17a, 40a-41a.

In 1981, after the case was transferred to the District of South Dakota, petitioners moved to dismiss the complaint. They contended that respondents had failed to state a claim, that there was a lack of personal jurisdiction, and that the allegations in the complaint were vague and conclusory. The district court granted the motion to dismiss in part, permitting respondents leave to file an amended complaint. App., *infra*, 39a-58a. The court held, first, that all but one of the named defendants had been improperly served with process (App., *infra*, 41a-50a). Next, the court determined that respondents had failed to state a claim under 18 U.S.C. 2, 241, and 371, and under the Posse Comitatus Act, 18 U.S.C. 1385, on which respondents had "place[d] their primary reliance"

(App., *infra*, 51a-53a). The court could not locate "the slightest indication of any legislative intent to create a private cause of action" under these statutes (App., *infra*, 51a-52a).[1] Finally, the court rejected respondents' "central" claim (App., *infra*, 53a) to a constitutional "right to be free of the use of the military in the enforcement of civil law" (App., *infra*, 53a-57a). The court held that "the mere enforcement of the law by officials who happen to be members of the military and involving no infringement of a citizen's recognized constitutional rights, does not present a constitutional violation giving rise to a private cause of action" (App., *infra*, 56a n.7). Because the respondents had alleged other violations of their rights under the First, Fourth and Fifth Amendments—such as violations of their freedoms of movement, right to travel, and right of assembly—the court did not dismiss the complaint in full (App., *infra*, 56a). Instead, in light of the vagueness of the complaint (App., *infra*, 57a-58a), the court granted respondents leave to file an amended complaint within 40 days.

Respondents thereafter filed an amended complaint. In it, respondents again alleged—as their only claim for relief—that petitioners had violated the Fourth Amendment by using the military in contravention of the Posse Comitatus Act, 18 U.S.C. 1385 (App., *infra*, 35a). The district court once more dismissed the complaint (App., *infra*, 34a-38a), holding that it could not "accept the proposition that, because Con-

[1] As to the claims under 18 U.S.C. 241 and 371, the district court cited authority rejecting assertions of a civil damage remedy. *E.g., Fiorino* v. *Turner*, 476 F. Supp. 962, 963 (D. Mass. 1979). The court said it had found no such direct authority concerning the question of a private right of action under 18 U.S.C. 2 and 1385.

gress has chosen to put statutory limits on the actions of government officials, any act that goes beyond these limits is thereby an automatic violation of the Constitution" (App., *infra*, 37a). The court observed that "[j]ust as a state may impose greater restrictions on police activity than that required under the Constitution, so may Congress also impose greater restrictions on the ability of the federal government to enforce laws than are imposed on those officials by the Constitution itself" (*ibid.*). Since "the Constitution itself does not prohibit the use of the military in civil law enforcement," and since Congress—while limiting the role of the military in civilian life under 18 U.S.C. 1385—did not create "a private cause of action for violations of that statute," then "even assuming defendants were all guilty of § 1385 violations, this fact provides no basis for [respondents'] claim" (App., *infra*, 37a-38a).

3. The court of appeals reversed (App., *infra*, 15a-33a). The court framed the issue as "whether a search or seizure, otherwise permissible, can be rendered unreasonable under the Fourth Amendment because military personnel or equipment were used to accomplish those actions" (App., *infra*, 19a). In resolving this question, the court held, "the limits established by Congress on the use of the military for civilian law enforcement provide a reliable guidepost by which to evaluate the reasonableness for Fourth Amendment purposes of the seizures and searches" (App., *infra*, 24a). In particular, the court stated, "[respondents'] Fourth Amendment case * * * must stand or fall on the proposition that military activity in connection with the occupation of Wounded Knee violated the Posse Comitatus Act" (App., *infra*, 26a). Relying on its previous decision in *United States* v.

Casper, 541 F.2d 1275 (8th Cir. 1976) (per curiam), cert. denied, 430 U.S. 970 (1977), the court stated (*ibid.*) that the Act was not violated by the alleged use of military personnel, planes and cameras for aerial surveillance; by reliance on military advice in dealing with the insurrection; and by the furnishing of military equipment and supplies.[2] The court held, however, that respondents' allegations went beyond these limits, and included the purported involvement of military personnel in " 'maintain[ing] roadblocks and armed patrols constituting an armed perimeter around the village of Wounded Knee' " (App., *infra*, 29a). To that extent, the court concluded, respondents' allegations stated a violation of the Posse Comitatus Act and thus gave rise to a Fourth Amendment claim sufficient "to survive a motion to dismiss" (*ibid.*).[3]

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[2] To the extent that respondents based their Fourth Amendment claim on these purported abuses by the military, the court upheld the district court's dismissal (App., *infra*, 29a-30a). The court of appeals stated (*ibid.*) that "this sort of activity does not violate the Posse Comitatus Act * * * [and] is therefore not 'unreasonable' for Fourth Amendment purposes."

[3] The court rejected respondents' claims under the Due Process Clause of the Fifth Amendment, finding "no clear support for the novel theory" that there can be a "due-process violation by reason of the mere fact that the confinement and other deprivations inflicted upon [respondents] derived from military action instead of civilian" (App., *infra*, 30a). Still, the court noted, it was "reinforced" in its decision to uphold the dismissal of these claims "by the knowledge that all of the proof relevant under such a theory will still come in if and when the Fourth Amendment search-and-seizure theory goes to trial. In other words, [respondents] do not really need the due-process theory in order to secure relief here, the Court having already held that an unauthorized action by a military officer can be 'unreasonable' under the Fourth Amendment even though the same thing, if done by a civilian official, would not." App., *infra*, 32a.

The court declined to reach, on the present record, petitioners' claims that they were not properly served and that the action was barred by the statute of limitations (*ibid.*).

[4] The court also held that on remand petitioners might be able to establish defenses of either absolute or qualified immunity (App., *infra*, 3a), or demonstrate that their conduct was exempted by Congress from the reach of the Posse Comitatus Act by other legislation (App., *infra*, 3a-4a). In addition, the court refused to reconsider the panel's holding that "indirect or passive military involvement, such as aerial surveillance and the furnishing of materials and supplies" does not violate the Posse Comitatus Act and therefore states no Fourth Amendment claim (App., *infra*, 10a).

4. The court thereafter granted petitioners' application for rehearing en banc (see 788 F.2d 494), but after supplemental briefing and argument the court divided 5-4 in adhering to the panel's decision (App., *infra*, 1a-14a). The majority acknowledged "that the Constitution is conceptually and practically distinct from any Act of Congress, and [that] it is not the law that any search and seizure that violates a federal statute also violates the Fourth Amendment." The court stated, however, that "the Posse Comitatus Act is a special case" and that, in any event, "Acts of Congress * * * must be at least *prima facie* evidence of what society as a whole regards as reasonable" (*ibid.*), citing instances in which this Court has considered statutory law in making decisions under the Fourth Amendment. App., *infra*, 5a. The majority therefore "adhere[d] to the decision[] made by the panel, * * * upholding as legally sufficient the Fourth Amendment theory, to the extent that the complaint alleges a violation of the Posse Comitatus Act" (App., *infra*, 10a).[4]

Judge Fagg, joined by three other judges, dissented (App., *infra*, 11a-14a). In his view, the Posse Comitatus Act "should not be the sole threshold consideration in determining whether an unreasonable seizure in violation of the Fourth Amendment has occurred" (App., *infra*, 11a). As he put it (App., *infra*, 11a-12a):

> To accept the court's view renders unnecessary any examination of the circumstances or exigencies giving rise to the actions taken or the scope, nature, or purpose for which the actions were taken. Under the court's analysis, regardless of the lives saved, the property protected, and the otherwise reasonable and responsible actions of military officers seeking to assist civil law enforcement officials, a violation of the Posse Comitatus Act results in all other considerations becoming constitutionally irrelevant and per se constitutes a violation of the Fourth Amendment.

Judge Fagg agreed that "the Posse Comitatus Act rightfully seeks to restrict military involvement in civilian affairs" (App., *infra*, 12a); but, he added, "[t]he Constitution itself does not prohibit or restrict such involvement" and here "[petitioners'] actions were reasonable" (*ibid.*). The dissent also noted that "by focusing wholly on the Posse Comitatus Act [the majority] has created a private cause of action not expressly or by implication authorized by Congress" (App., *infra*, 13a).[5]

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[5] Judge Fagg found it "truly ironic that military officials who responded to requests for assistance by civilian authorities and who in the face of an armed uprising acted not to subvert but to preserve and protect the Constitution and restore civilian rule now face substantial monetary liability" (App., *infra*, 13a).

REASONS FOR GRANTING THE PETITION

The court of appeals in this case upheld as legally sufficient respondents' Fourth Amendment claim "to the extent that the complaint alleges a violation of the Posse Comitatus Act" (App., *infra*, 10a). The decision raises two related issues of considerable and recurring importance.

First, by deriving its constitutional holding entirely from the perceived statutory violation, the court of appeals spared itself the obligation, as the dissenting judges noted, of "examin[ing] * * * the circumstances or exigencies giving rise to the actions taken or the scope, nature, or purpose for which the actions were taken" (App., *infra*, 11a-12a). The court's decision rests on the incorrect premise that the violation of at least certain statutes, without more, may make unreasonable what is otherwise a reasonable seizure within the meaning of the Fourth Amendment. That holding is squarely in conflict with several decisions of this Court that have flatly rejected any such single-minded reliance on statutes for the meaning and content of the Fourth Amendment.

Second, assuming that the court's mechanical reliance on a statutory violation were otherwise plausible, the result here is peculiarly askew, since the statute on which the court relied simply does not address the Fourth Amendment issue presented. The Posse Comitatus Act has nothing to do with the standards for reasonable searches and seizures; and the court of appeals' conclusion to the contrary is at odds with the decisions of other circuits that have considered, and rejected, analogous claims based on the Posse Comitatus Act. By relying on a statute that simply regulates the deployment of certain mili-

tary personnel, the court of appeals confused the reasonableness of a *search* with the identity of the *searchers*. The Fourth Amendment proscribes unreasonable searches, but does not, by its terms, address the identity of the government officials who execute a search. Assuming, *arguendo*, that the latter factor is relevant to an overall reasonableness analysis, the court of appeals was clearly mistaken in sustaining a complaint where the only conceivable basis for finding a Fourth Amendment violation derived from the identity of the seizing officials.

1. This Court has consistently made clear that "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)). The Court has stressed that "'the balancing of competing interests'" is "'the key principle of the Fourth Amendment'" (*Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981) (citation omitted)), and that "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted" (*Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)). And in making these balancing judgments courts cannot resort to "any fixed formula" or "litmus-paper test" (*United States* v. *Rabinowitz*, 339 U.S. 56, 63 (1950)), as "[t]he test of reasonableness cannot be stated in rigid and absolute terms" (*Harris* v. *United States*, 331 U.S. 145, 150 (1947)). "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment de-

pends upon the facts and circumstances of each case * * *" (*Cooper* v. *California*, 386 U.S. 58, 59 (1967)).

The court of appeals pretermitted this balancing of competing interests in favor of a simple, but misleading equation: if the involvement of the military at Wounded Knee could be said to have violated the Posse Comitatus Act, then the purported seizure of respondents was necessarily unreasonable under the Fourth Amendment. Such a truncated analysis is plainly in conflict with this Court's insistence that questions of "reasonableness" under the Fourth Amendment not be reduced to formulaic rules or "litmus-paper tests."

More specifically, this Court has made clear that the content of the Fourth Amendment cannot be determined simply by incorporating statutory provisions. In *Cooper* v. *California*, *supra*, for example, the Court held that police officials did not violate the Fourth Amendment when they impounded a defendant's car and thereafter searched its contents. The lower court had suppressed the evidence seized during the search because the court found that the officers had no authority under the state forfeiture statute to conduct the search. This Court rejected that conclusion, in language equally applicable to the holding of the court of appeals in this case (386 U.S. at 61):

> [T]he question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.

In upholding the search and seizure, the Court refused simply to defer to the lack of state authority for the search. Instead, the Court considered the full range of Fourth Amendment interests, including the nature of the intrusion by the police and the justifications to support it. Accord, *Sibron* v. *New York*, 392 U.S. 40, 59-62 (1968).

More recently, the Court has rejected attempts to define what is a "reasonable expectation of privacy" under the Fourth Amendment simply by reference to statutory provisions. In *Oliver* v. *United States*, 466 U.S. 170 (1984), the Court held that trespass laws could not create a Fourth Amendment privacy interest in so-called "open fields." Trespass laws, the Court held, are not designed to protect the same interests as the Fourth Amendment. As the Court put it (466 U.S. at 183 n.15):

> [T]he common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title.

Similarly, in *Dow Chemical Co.* v. *United States*, No. 84-1259 (May 19, 1986), rejecting a Fourth Amendment claim asserted by the plaintiff, the Court held that trade secret law, as well as state tort law governing unfair competition, "does not define the limits of the Fourth Amendment" (slip op. 4). See also *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) (unless a statute provides the basis for the cause of

action sued on, a violation of that statute does not strip federal or state officials of their immunity).

These cases make clear that there is no statutory short-cut to a detailed consideration of all the factors bearing on the reasonableness of a seizure. The court of appeals thus erred in holding that an otherwise permissible search or seizure could be rendered unconstitutional solely because it was carried out in a manner that violated the Posse Comitatus Act. Even if that statute were intended to address the reasonableness of a seizure—which, as we show below, it manifestly was not—the court's conclusion that Fourth Amendment reasonableness could turn exclusively on statutory legality is in sharp conflict with this Court's precedents. Review by this Court is warranted.

2. The court of appeals was, in any event, plainly mistaken in treating the Posse Comitatus Act as a "reliable guidepost by which to evaluate the reasonableness for Fourth Amendment purposes of the seizures and searches in question here" (App., *infra*, 24a). The statute simply will not bear the weight that the court placed on it.

The Posse Comitatus Act was passed in 1878 in response to frustration in the South over the use of federal soldiers to uphold the laws of carpetbagger governments and to influence elections. See generally Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civilian Law Enforcement*, 54 Geo. Wash. L. Rev. 404, 406-407 (1986). Even then, however, its importance and meaning were not entirely apparent. See, *e.g.*, 7 Cong. Rec. 4241-4242 (1878) (remarks of Sen. Edmunds); *id.* at 4296 (remarks of Sen. Kirkwood); *id.* at 4298-4299 (remarks of Sen. Howe). In large part,

the Act, originally attached as a rider to an army appropriations bill, was enacted to ensure that the appropriations bill secured sufficient Democratic votes to pass the House of Representatives. See *id.* at 4303 (remarks of Sen. Conkling); *id.* at 4296, 4301 (remarks of Sen. Bayard). Notably, although the court of appeals deferred to the Act as "*prima facie* evidence of what society as a whole regards as reasonable" (App., *infra*, 5a), it appears that there has never been a prosecution under this "obscure and all-but-forgotten statute." *Chandler* v. *United States*, 171 F.2d 921, 936 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949). See Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 Mil. L. Rev. 109, 111 (1984).

The text and structure, in fact, make plain that the Act was never intended to furnish a definition of "reasonableness" for purposes of the Fourth Amendment. For example, the Act applies only to "the Army or the Air Force"; it does not cover the Coast Guard (*United States* v. *Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982), cert. denied, 459 U.S. 1156 (1983)), and it applies to the Navy and Marines only by the grace of federal policy (32 C.F.R. 213.10 (c)(1985); see *United States* v. *Walden*, 490 F.2d 372, 374-375 (4th Cir.), cert. denied, 416 U.S. 983 (1974)). Moreover, also by its express terms, the scope of the Act is open to ready modification by Congress. See 32 C.F.R. 213(10)(a)(2) (listing exceptions to the Act). Indeed, the potential reach of the statute was measurably narrowed in 1981. See Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 905, 95 Stat. 1114-1116 (codified at

10 U.S.C. (& Supp. II) 371-376).[6] Finally, as the court of appeals itself recognized (App., *infra*, 23a-24a), under the Act the President may summon the military to assist directly in law enforcement simply by issuing an appropriate proclamation. See 41 Op. Att'y Gen. 313, 326-332 (1957). See also Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 714-715 & nn. 65, 66 (1976); Note, *Honored in the Breech: Presidential Authority to Execute the Laws With Military Force*, 83 Yale L.J. 130, 137-142 (1973). It is impossible to find in this statute—riddled as it is with exceptions and susceptible as it is to alteration by Congress and suspension by the President—any "reliable guidepost" by which to measure the reasonableness of a search.

Not surprisingly, every circuit to have considered a motion to suppress evidence arising under the Act has refused to do so, in one instance explicitly rejecting the broad premises applied by the court of appeals in this case. In that latter case, *United States* v. *Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 416

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[6] The 1981 amendments expanded the statutory authority of the military to assist civilian law enforcement officials with information (10 U.S.C. 371), equipment and facilities (10 U.S.C. 372), and training and advice (10 U.S.C. 373). The amendments also permit military personnel limited statutory authority to operate or maintain equipment made available to civilian forces enforcing particular laws (10 U.S.C. 374). The court of appeals in this case held (App., *infra*, 22a n.8) that the 1981 amendments are irrelevant to the Fourth Amendment analysis because they were not in effect when the seizures at Wounded Knee occurred. But that misses the point: the infinite malleability of the statute demonstrates that it was not intended to prescribe a dispositive definition of "reasonableness" under the Fourth Amendment.

U.S. 983 (1974), the Fourth Circuit rejected a defendant's claim that evidence should be suppressed because military personnel had been used as undercover agents. The court agreed that Navy regulations implementing the Posse Comitatus Act had been violated; but it refused to equate that violation with the edicts of the Fourth Amendment. The regulations, noted the court, "express[] a policy that is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants" (490 F.2d at 377 (footnote omitted)). In this connection, the court observed, "the policy consideration underlying the Posse Comitatus Act is not absolute" in that "the Constitution recognizes that in certain circumstances, military preservation and enforcement of civilian law is appropriate" (*id.* at 377 n.11). Other circuits, while not discussing the Fourth Amendment as such, have likewise refused to suppress evidence based on alleged violations of the Posse Comitatus Act. See *United States* v. *Hartley*, 796 F.2d 112, 114-115 (5th Cir. 1986); *United States* v. *Roberts*, 779 F.2d 565, 566-568 (9th Cir. 1986); *United States* v. *Hartley*, 678 F.2d 961, 977-978 (11th Cir. 1982), certs. denied, 459 U.S. 1170 and 1183 (1983); *United States* v. *Wolffs*, 594 F.2d 77, 84-85 (5th Cir. 1979).

Moreover, the court of appeals' equation of a violation of the Posse Comitatus Act with a violation of the Fourth Amendment is particularly inapt because it confuses the identity of the seizing officers with the reasonableness of the seizure they perform. This Court has made clear that the protections of the Fourth Amendment do not turn on who conducts the search or seizure. As the Court put it in *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978), "there is no

diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman * * *." But, by the same token, there can be no *greater* Fourth Amendment protection simply by virtue of the uniform of the seizing official, and that is precisely the fallacy of the court of appeals' decision; it predicates the reasonableness of the search on the simple fact that military personnel were, to some extent, involved.

Because the court of appeals applied a statute that does not speak to the Fourth Amendment, in a fashion plainly at odds with the results in other circuits, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

BARBARA L. HERWIG
MARC JOHNSTON
Attorneys

DECEMBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2617

GLADYS BISSONETTE, ELLEN MOVES CAMP, EUGENE WHITE HAWK, MARVIN GHOST BEAR, EDGAR BEAR RUNNER, OSCAR BEAR RUNNER, SEVERT YOUNG BEAR, RACHEL WHITE DRESS, HELEN RED FEATHER, EDDIE WHITE DRESS, VICKI LITTLE MOON, MADONNA GILBERT, LORELEI MEANS, and CARLA BLAKEY, APPELLANTS

v.

ALEXANDER HAIG, RICHARD G. KLEINDIENST, JOSEPH T. SNEED, CHARLES D. ABLARD, JOSEPH H. TRIMBACH, RALPH E. ERICKSON, HARLINGTON WOOD, JR., KENNETH BELIEU, ROLLAND GLESZER, EDMUND EDWARDS, JOHN HAY, and VOLNEY F. WARNER, APPELLEES

Decided Sept. 16, 1986

Before LAY, Chief Judge, and HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, en banc.

ARNOLD, Circuit Judge.

The complaint in this case alleges, among other things, that plaintiffs were seized and confined within the Village of Wounded Knee, South Dakota, by defendants, and that defendants accomplished this seizure and confinement by use of the United States Army, in violation of the Posse Comitatus Act, 18 U.S.C. § 1385. That statute makes it a felony to use the United States Army for domestic law-enforcement purposes, unless the use is expressly authorized by the Constitution itself or Act of Congress. The complaint alleges that defendants' acts violated not only the Posse Comitatus Act, but also the Fourth, Fifth, and Eighth Amendments to the Constitution of the United States.

In *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985), a panel of this Court held that the complaint was not so deficient as to be subject to dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The panel held that the complaint stated a claim under the Fourth Amendment. A seizure in violation of the Posse Comitatus Act, it reasoned, was "unreasonable" within the meaning of the Fourth Amendment, in view of the long American tradition limiting the military's internal and domestic activities. The Fifth and Eighth Amendment theories of the complaint, however, were held legally insufficient, and to that extent the judgment of the District Court (which had dismissed the complaint in its entirety) was affirmed. As to the Fourth Amendment, the case was remanded for further proceedings, including, as appropriate, summary judgment or trial.

We granted the defendants' petition for rehearing en banc. After supplemental briefing and oral argument, we reach the same conclusions as the panel did. We adopt the substance and reasoning of its opinion,

which need not be repeated here at length. We add a few words to address the major points made by defendants in their rehearing petition, supplemental brief, and oral argument.

1.

It was suggested at the argument that defendants may be immune, either absolutely or qualifiedly, from personal liability for damages. There may be a qualified-immunity defense here. But it has never been pleaded, or even urged in any of the briefs, at least in this Court. Indeed, defendants have not yet filed an answer. On remand, they will be free to make a claim of immunity, which can then be litigated in due course after such development of the facts as may be appropriate. We have before us only the question whether the complaint states a claim, and a complaint need not negative a qualified-immunity defense. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

2.

The same answer applies to defendants' suggestion that their conduct was not in violation of the Posse Comitatus Act because it was expressly authorized by other statutes, *e.g.*, 25 U.S.C. § 180. They argue that this statute expressly authorizes the use of military force to remove anyone who unlawfully attempts to take over lands that the United States has by treaty granted to an Indian tribe. "Under this provision," defendants say, Appellees' Supplemental Brief on Rehearing en Banc 14, "use of military force plainly would have been appropriate at Wounded Knee, where a group largely composed of non-members of the Oglala Sioux Tribe invaded the Pine Ridge Res-

ervation with the avowed purpose of ousting the elected tribal government, and where the tribal government in fact requested military intervention." This may be what happened, and 25 U.S.C. § 180 may turn out to be a good defense, but there is no way we can tell for sure at this stage of the game. On remand, defendants may set up in justification any statute, including Section 180, and any facts they can prove. We could dismiss the complaint under Rule 12(b)(6) only if these defenses were evident on its face, creating an insuperable bar to relief, and no one even argues that is true here.[1]

3.

Defendants' most substantial argument is that it is wrong to equate violation of a statute—here the Posse Comitatus Act— with violation of a constitutional provision—here the Fourth Amendment. This is the real issue in the case, and defendants are right to urge it vigorously. A search or seizure otherwise permissible, they say, cannot become unconstitutional simply because it violates a statute. Military violators of the Posse Comitatus Act are subject to criminal prosecution, but commiting a felony is not the same thing as violating the Constitution. Congress should not be able by statute to create and shape constitutional rights and duties. Furthermore, they

[1] Our opinion in no way limits the power of Congress expressly to authorize use of the military, either in 25 U.S.C. § 180 or in any of the other laws granting such authority, *e.g.*, 10 U.S.C. §§ 333 (enforcement of judicial decrees by military pursuant to presidential proclamation), 371-78 (enforcement of drug laws in some circumstances). The question of what limits the Constitution places on such express statutory authorizations is not presented by this appeal.

argue, the Posse Comitatus Act itself does not create a private right of action for damages for its violation (and plaintiffs do not now deny this), so recognizing a Fourth Amendment theory in this case would allow plaintiffs to do indirectly, by way of a *Bivens* constitutional-tort action, what they could not do directly.

Certainly it is true that the Constitution is conceptually and practically distinct from any Act of Congress, and it is not the law that any search and seizure that violates a federal statute also violates the Fourth Amendment. The panel opinion explains why we believe the Posse Comitatus Act is a special case, justifying the result we have reached. There is nothing startling or novel about using a statute in this way. The Fourth Amendment (we begin, necessarily, with its words) forbids "unreasonable" searches and seizures. The word "unreasonable" implies that the propriety of a search or seizure is to be judged against a background or matrix of societal expectations and assumptions. Some reference must be made to a source outside the Fourth Amendment itself to determine, for example, whether an expectation of privacy is reasonable and therefore deserving of constitutional protection. Such sources include "concepts of real or personal property law [and] . . . understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 143-44 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978). Acts of Congress, which after all must be at least *prima facie* evidence of what society as a whole regards as reasonable, are among these sources.

We will mention a few examples of this form of reasoning in Fourth Amendment jurisprudence. A whole line of cases has arisen holding that the Amendment applies with less force to inspections and

searches of closely regulated businesses. A long history of pervasive regulation—a long history, that is, of *statutory* activity—affecting the particular industry, is one of the factors stressed in holding certain searches "reasonable." *E.g., Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (Court notes that statutes provide a certain and regular program of inspection of mines; defers to legislative determination that it is reasonable not to require a warrant); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms industry; search upheld; "Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority." *Id.* at 316, 92 S.Ct. at 1596.); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (warrantless search of business premises of liquor licensee upheld, but forcible entry disapproved because it exceeded inspection authority granted by statute). This Court applied the pervasively-regulated-industry doctrine to uphold searches and seizures on a lesser-than-usual showing of probable cause in *United States v. Jamieson-McKames Pharmaceuticals, Inc.*, 651 F.2d 532 (8th Cir. 1981), *cert. denied*, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982). In doing so, however, we stressed the result would be otherwise if the "extent of the intrusion [were not] . . . limited to the purposes specified *in the statute*," 651 F.2d at 542 (emphasis supplied). It is settled, then, that statutes of a certain kind can be factors tending to make reasonable a search that would otherwise violate the Fourth Amendment.

Two recent Supreme Court cases are a variation on this theme. In both *Dow Chem. Co. v. United States*,

—— U.S. ——, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), and *California v. Cirgolo*, —— U.S. ——, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), aerial searches were upheld against Fourth Amendment challenges. In both cases the Court mentioned that the official aircraft conducting the searches was within public navigable airspace. Federal statutes and regulations, defining navigable airspace, were cited. It seems that if, to take *Dow* as an example, the EPA-rented airplane had not been in lawful airspace, a different result would have followed, even though such reasoning makes constitutional protections under the Fourth Amendment depend, in part, on the contours of statutes and regulations, which are subject to change by Congress or the issuing regulatory agency.

It is equally true that the presence of statutes and regulations may make unreasonable a search that might otherwise have been perfectly valid under the Fourth Amendment. In *Oliver v. United States*, 239 F.2d 818 (8th Cir.), *cert. dismissed*, 353 U.S. 952, 77 S.Ct. 865, 1 L.Ed.2d 858 (1957), postal authorities opened and searched a package which was tied with twine but not sealed shut. *Ex parte Jackson*, 6 Otto 727, 96 U.S. 727, 24 L.Ed. 877 (1878), had held, and it remains the law, that warrantless searches of sealed letters and packages deposited in the mail are unconstitutional. In *Oliver* the government argued that *Jackson* did not apply: the package in question was not "sealed." But first-class postage had been paid on the package, and postal regulations in effect at the time of the search said that letters and packages bearing first-class postage were not subject to inspection without a warrant. We held the search unconstitutional. It did not bother

us that the result might have been different if postal regulations had authorized a search of unsealed packages:

> It is not of consequence here that it may constitutionally have been possible for statutes or regulations of broader scope as to mail examination to have been adopted. The question of unreasonable search and seizure in postal inspections is entitled to be resolved, where legislative measures or administrative regulations exist, by such valid limits as have been fixed and held out thereunder as constituting the extent of mail opening and examination in which the Post Office Department will engage.

239 F.2d at 823. This passage comes close to fitting precisely the case before us.

Not only federal law, but also state law, can be relevant in determining what is reasonable under the Fourth Amendment. For example, in *United States v. Rambo*, 789 F.2d 1289 (8th Cir.1986), a criminal defendant moved to suppress evidence seized at the time of his warrantless arrest by police officers. He argued that under Minnesota law police officers may "arrest an individual for a misdemeanor without a warrant only for offenses committed in their presence. . . ." *Id.* at 1292. We held that the motion to suppress had been correctly denied, but only after carefully examining the statutes of Minnesota to determine the authority of the officers. "The validity of a warrantless arrest by a state officer is an issue governed in the first instance by State law. *Johnson v. United States*, 333 U.S. 10, 15 n. 5 [68 S.Ct. 367, 370 n. 5, 92 L.Ed. 436] (1948)." *Rambo*, 789 F.2d at 1293. Not only statutes of the state, but also opinions of the Supreme Court of Minnesota, were analyzed in our opinion. The clear premise was that if the arrest was not authorized by Minnesota law, it was invalid, and the motion to suppress, based on the Fourth Amendment, would have to be granted. *Id.* at 1292-93. A search authorized by state law could still be constitutionally invalid, *id.* at 1295-1297, but a search unauthorized by state law would *ipso facto* violate the Fourth Amendment.

An analogous rule applies, of course, to federal officers. A network of statutes authorizes them to make arrests in various circumstances and for various types of offenses. See, *e.g.*, 18 U.S.C. §§ 3052 (FBI Agents), 3053 (United States Marshals), 3056 (Secret Service), 3061 (postal personnel). Arrests outside the authority granted by these statutes are unlawful and invalid (unless they can be upheld as citizens' arrests under the common or statute law of the state where they took place), and anything seized incidentally to the arrest must be suppressed as evidence, absent some exception to the exclusionary rule. See, *e.g.*, *Alexander v. United States*, 390 F.2d 101 (5th Cir.1968) (evidence suppressed because arrest not authorized by federal or state statutes); *United States v. Moderacki*, 280 F.Supp. 633 (D.Del.1968) (same). *Cf. Montgomery v. United States*, 403 F.2d 605 (8th Cir.1968) (arrest by postal inspectors upheld under common law of Missouri; therefore unnecessary to decide whether federal statutes also authorized the arrest; motion to suppress evidence accordingly denied). The fact that an arrest is authorized by statute is strong evidence of its reasonableness. See also *United States v. Watson*, 423 U.S. 411, 415, 96 S.Ct. 820, 823, 46 L.Ed.2d 598 (1976), upholding an arrest by postal inspectors without a war-

rant, and observing that 18 U.S.C. § "3061 represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so." (footnote omitted).

In the present case, furthermore, we deal with something quite different from a seizure simply unauthorized by statute. We deal with a seizure affirmatively forbidden by a criminal law of long standing, itself expressive of an authentically American tradition of even longer standing. We conclude, for the reasons given in this opinion and in the panel opinion, that the complaint states a claim under the Fourth Amendment.

4.

Defendants were not alone in being displeased with the panel opinion. Plaintiffs also have taken exception to it, branding as "flat wrong" the panel's interpretation of the Posse Comitatus Act as not prohibiting indirect or passive military involvement, such as aerial surveillance and the furnishing of materials and supplies. In so holding, the panel followed Circuit authority in the form of *United States v. Casper*, 541 F.2d 1275 (8th Cir.1976) (per curiam), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977). Plaintiffs ask us to overrule *Casper*. We decline to do so.

5.

In sum, we adhere to the decisions made by the panel, rejecting the Fifth and Eighth Amendment theories pleaded in the complaint, but upholding as legally sufficient the Fourth Amendment theory, to the extent that the complaint alleges a violation of the Posse Comitatus Act as interpreted in *Casper*.

The judgment of the District Court is therefore reversed, and this cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

FAGG, Circuit Judge, with whom BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, join, dissenting.

The Posse Comitatus Act, 18 U.S.C. § 1385, was enacted by Congress during the reconstruction era in an apparent response to perceived abuses by the military in reconstruction states. The Act as enacted and until today was criminal in nature and provided no private cause of action for damages.

The court now judicially amends the Act to provide a private cause of action for individuals asserting Fourth Amendment violations. The court has no choice but to do so in light of the plaintiffs' concession that defendants' actions were in all other respects reasonable and nonactionable. As the panel itself recognized and the court today reconfirms, *ante* at 814, "[p]laintiffs' Fourth Amendment case * * * must stand or fall on the proposition that military activity in connection with the occupation of Wounded Knee violated the Posse Comitatus Act," *Bissonette v. Haig*, 776 F.2d 1384, 1389 (8th Cir.1985). Because I cannot accept the implications of the court's decision, I must dissent.

Unlike the court, I believe the restrictions imposed by the Posse Comitatus Act should not be the sole threshold consideration in determining whether an unreasonable seizure in violation of the Fourth Amendment has occurred. To accept the court's view renders unnecessary any examination of the circum-

stances or exigencies giving rise to the actions taken or the scope, nature, or purpose for which the actions were taken. Under the court's analysis, regardless of the lives saved, the property protected, and the otherwise reasonable and responsible actions of military officers seeking to assist civil law enforcement officials, a violation of the Posse Comitatus Act results in all other considerations becoming constitutionally irrelevant and per se constitutes a violation of the Fourth Amendment.

While the Posse Comitatus Act rightfully seeks to restrict military involvement in civilian affairs, the Act should not be viewed as constitutionally controlling. The Constitution itself does not prohibit or restrict such involvement, and in fact, there are numerous instances in this nation's history, both before and after the adoption of the Posse Comitatus Act, when the military has been called upon to assist civilian law enforcement officials. *See generally* Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L.Rev. 1 (1971). A violation of the Act cannot be viewed in isolation from the particular situation before the court. Rather, there must be a qualitative analysis of the military involvement and the circumstances that gave rise to that involvement. Because defendants' actions were reasonable, I conclude no constitutional violation has been asserted.

Plaintiffs argue, however, that regardless of all else the actions taken by defendants cannot be constitutionally reasonable because they were felonious in nature. I agree with the court that "the Constitution is conceptually and practically distinct from any Act of Congress, and it is not the law that any search and seizure that violates a Federal statute

also violates the Fourth Amendment." *Ante* at 814. I am further unpersuaded by plaintiffs' argument because unlike most instances in which the action criminalized is inherently wrong and socially indefensible, the actions rendered criminal by the Posse Comitatus Act are not necessarily inherently improper. Instead, under the Act actions are equally felonious and punishable regardless of whether they are indefensible or, as here, in all respects honorable and blameless. As a result, because of the wide range of honorable and dishonorable actions falling equally within the scope of the Act, I believe that while a violation of the Act is a factor to be considered, the violation alone should not per se render equally liable for money damages the pillager and the liberator.

Here, it is truly ironic that military officials who responded to requests for assistance by civilian authorities and who in the face of an armed uprising acted not to subvert but to preserve and protect the Constitution and restore civilian rule now face substantial monetary liability. The actions taken were restrained and objectively reasonable and in the circumstances of this case fail to implicate any of the concerns identified by the panel opinion. *Bissonette*, 776 F.2d at 1387-88. In fact, the entire purpose behind the actions taken was to ensure and restore domestic tranquility, a goal pointedly identified by the Founding Fathers in the Preamble of the Constitution.

In addition to creating the potential for unwarranted monetary damages largely unrelated to any substantial Fourth Amendment interest, the court by focusing wholly on the Posse Comitatus Act has created a private cause of action not expressly or by implication authorized by Congress. If Congress wished to provide a private action for damages for

the violation of the Posse Comitatus Act, Congress could have provided one. As allowed for in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971), and as clarified by the Supreme Court in *Bush v. Lucas*, 462 U.S. 367, 380, 103 S.Ct. 2404, 2412, 76 L.Ed.2d 648 (1983), there are cases, and I believe this to be one, in which Congress rather than the court should decide in the first instance whether a civil remedy should be available. *See Arcoren v. Farmers Home Administration*, 770 F.2d 137, 140 (8th Cir.1985).

As a final point, even accepting the court's view, I see no reason to prolong further the present action. Defendants have raised the issue of qualified immunity in their petition for rehearing en banc. No further factual development is needed in this case to resolve this issue.

Very simply, only today, more than thirteen years after the actions in question, is it in any way "clearly established" that otherwise entirely reasonable actions of the military are rendered constitutionally unreasonable and actionable by the violation of the Posse Comitatus Act. Because no person could reasonably have been expected to know that regardless of any other consideration a violation of the Posse Comitatus Act gives rise to and in fact constitutes a per se violation of the Fourth Amendment, I would dismiss plaintiffs' action on the basis of qualified immunity. *See Davis v. Scherer*, 468 U.S. 183, 193-96, 104 S.Ct. 3012, 3019-21, 82 L.Ed.2d 139 (1984); *see also Mitchell v. Forsyth*, —— U.S. ——, 105 S.Ct. 2806, 2818, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

The decision of the district court should be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2617

GLADYS BISSONETTE, ELLEN MOVES CAMP, EUGENE WHITE HAWK, MARVIN GHOST BEAR, EDGAR BEAR RUNNER, OSCAR BEAR RUNNER, SEVERT YOUNG BEAR, RACHEL WHITE DRESS, HELEN RED FEATHER, EDDIE WHITE DRESS, VICKI LITTLE MOON, MADONNA GILBERT, LORELEI MEANS, and CARLA BLAKEY, APPELLANTS

v.

ALEXANDER HAIG, RICHARD G. KLEINDIENST, JOSEPH T. SNEED, CHARLES D. ABLARD, JOSEPH H. TRIMBACH, RALPH E. ERICKSON, HARLINGTON WOOD, JR., KENNETH BELIEU, ROLLAND GLESZER, EDMUND EDWARDS, JOHN HAY, and VOLNEY F. WARNER, APPELLEES

Decided Nov. 12, 1985

Before ARNOLD, Circuit Judge, PHILLIPS,* Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

*** The Hon. Harry Phillips, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation. Judge Phillips took part in the oral argument and subsequent conference of the panel, at which all three judges voted to hold that the complaint stated a claim. He died before this opinion was circulated.**

ARNOLD, Circuit Judge.

This is an action for damages caused by defendants' alleged violations of the Constitution of the United States. The complaint alleges, among other things, that the defendants seized and confined plaintiffs within an "armed perimeter" by the unlawful use of military force, and that this conduct violated not only a federal statute but also the Fourth Amendment. The use of federal military force, plaintiffs argue, without lawful authority and in violation of the Posse Comitatus Act, 18 U.S.C. § 1385, was an "unreasonable" seizure of their persons within the meaning of the Fourth Amendment. We hold that the complaint states a claim upon which relief may be granted. The judgment of the District Court, dismissing the complaint with prejudice for failure to state a claim, will therefore be reversed, and the cause remanded for further proceedings consistent with this opinion.

I.

This case arises out of the occupation of the village of Wounded Knee, South Dakota, on the Pine Ridge Reservation by an armed group of Indians on February 27, 1973. On the evening when the occupation began, members of the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Indian Affairs Police sealed off the village by establishing roadblocks at all major entry and exit roads. The standoff between the Indians and the law-enforcement authorities ended about ten weeks later with the surrender of the Indians occupying the village.[1]

[1] Several of these facts are not contained in the record on appeal. However, they are referred to in a previous decision of our Court, *United States v. Casper*, 541 F.2d 1275, 1277 n. 4 (8th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977), and we present them here only as background information.

In February 1975, the plaintiffs, most of whom at the time of the occupation were residents of the Pine Ridge Indian Reservation, brought this action in the District Court for the District of Columbia alleging that the defendants, who were military personnel or federal officials, conspired to seize and assault them and destroy their property in violation of several constitutional and statutory provisions. In 1981, after the case was transferred to the District of South Dakota,[2] the defendants renewed their motion to dismiss for failure to state a claim. The District Court held that no private right of action exists under 18 U.S.C. §§ 2, 241, 371, or 1385,[3] and that no claim was stated under the Constitution merely because the persons who allegedly injured the plaintiffs were military personnel instead of civilians. *Lamont v. Haig*, 539 F.Supp. 552 (D.S.D.1982). The Court gave the plaintiffs 40 days to file an amended complaint, which they did, and the Court again dismissed because the plaintiffs relied exclusively on the theory (rejected by the District Court) that constitutional violations occurred because military personnel and

[2] The action was initially dismissed on the ground of improper venue. The District of Columbia Circuit reversed and remanded. *Lamont v. Haig*, 590 F.2d 1124 (D.C.Cir. 1978). After further proceedings on remand on the question of venue, the District Court for the District of Columbia transferred the case to the District of South Dakota.

[3] This holding is no longer in dispute. On this appeal, plaintiffs base their asserted right of action on the Constitution itself, not on any statute as such.

equipment were used to accomplish various seizures, searches, and assaults. *Lamont v. Haig*, Civil No. 81-5048 (D.S.D. Oct. 18, 1984). The plaintiffs appeal from this last order.

II.

In their amended complaint, plaintiffs allege three sets of substantive claims. First, they claim that they were unreasonably seized and confined in the village of Wounded Knee contrary to the Fourth Amendment and their rights to free movement and travel.[4] Second, they claim that they were unreasonably searched by ground and aerial surveillance. In both cases, plaintiffs assert that the seizures and searches were unreasonable because "Defendants accomplished or caused to be accomplished those actions by means of the unconstitutional and felonious use of parts of the United States Army or Air Force. . . ." Designated Record (D.R.) at 36. Third, plaintiffs claim they were assaulted, deprived of life in one instance, and deprived of property contrary to their rights under the Fifth and Eighth Amendments. Again, plaintiffs allege that these actions were unconstitutional "for the reason that the arms used in the force or threat of force were parts of the United States Army or Air Force. . . ." D.R. at 41. This case comes to us on appeal from a dismissal for failure to state a claim, and we therefore accept for present purposes the factual allegations of the complaint.

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[4] The defendants do not challenge the legal sufficiency of the plaintiffs' allegation that they were "seized" by the encirclement of the village. The Supreme Court has recently stated that a seizure occurs "[w]henever an officer restrains the freedom of a person to walk away." *Tennessee v. Garner*, —— U.S. ——, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985).

These allegations must be viewed against the background of the Posse Comitatus Act of 1878, 18 U.S.C. § 1385, which plaintiffs claim was violated here. The statute provides:

> § 1385. Use of Army and Air Force as posse comitatus
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

A.

The first two sets of claims raise the question whether a search or seizure, otherwise permissible, can be rendered unreasonable under the Fourth Amendment because military personnel or equipment were used to accomplish those actions. We believe that the Constitution, certain acts of Congress, and the decisions of the Supreme Court embody certain limitations on the use of military personnel in enforcing the civil law, and that searches and seizures in circumstances which exceed those limits are unreasonable under the Fourth Amendment.

The Supreme Court has recently indicated that a seizure can be unreasonable even if it is supported by probable cause. *Tennessee v. Garner*, —— U.S. ——, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (seizure with deadly force of fleeing burglar who was apparently unarmed is unreasonable under the Fourth Amendment, whether or not probable cause exists to believe the fugitive has committed a crime). Reason-

ableness is determined by balancing the interests for and against the seizure. 105 S.Ct. at 1699-1700. Usually, the interests arrayed against a seizure are those of the individual in privacy, freedom of movement, or, in the case of a seizure by deadly force, life. Here, however, the opposing interests are more societal and governmental than strictly individual in character. They concern the special threats to constitutional government inherent in military enforcement of civilian law. That these governmental interests should weigh in the Fourth Amendment balance is neither novel nor surprising. In the typical Fourth Amendment case, the interests of the individual are balanced against those of the government. See, *e.g.*, *Tennessee v. Garner*, 105 S.Ct. at 1700. That some of those governmental interests are on the other side of the Fourth Amendment balance does not make them any less relevant or important.[5]

Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill

[5] In identifying the interests opposing a seizure by deadly force in *Tennessee v. Garner*, the Court specifically alluded to the "interest . . . of society, in judicial determination of guilt and punishment." 105 S.Ct. at 1700. This gives clear indication that the interests that a court may consider in determining the reasonableness of a seizure are not limited to an individual's interests in privacy, freedom of movement, and life, but may encompass broader social and governmental concerns as well.

the exercise of fundamental rights, such as the rights to speak freely and to vote,[6] and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

The interest in limiting military involvement in civilian affairs has a long tradition beginning with the Declaration of Independence and continued in the Constitution, certain acts of Congress, and decisions of the Supreme Court. The Declaration of Independence states among the grounds for severing ties with Great Britain that the King "has kept among us, in times of peace, Standing Armies without Consent of our Legislature . . . [and] has affected to render the Military independent of and superior to the Civil power." These concerns were later raised at the Constitutional Convention. Luther Martin of Maryland said, "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army." [7]

The Constitution itself limits the role of the military in civilian affairs: it makes the President, the highest civilian official in the Executive Branch, Commander in Chief of the armed services (Art. II, § 2); it limits the appropriations for armed forces to two years and grants to the Congress the power to make rules to govern the armed forces (Art. I, § 8, cl. 14); and it forbids the involuntary quartering of soldiers in any house in time of peace (Third Amendment).

[6] Congress has in fact passed two criminal statutes specially dealing with military intimidation at voting places. 18 U.S.C. §§ 592, 593.

[7] M. Farrand, Records of the Federal Convention 209 (1911), quoted in *Laird v. Tatum*, 408 U.S. 1, 18, 92 S.Ct. 2318, 2328, 33 L.Ed.2d 154 (1972) (Douglas, J., concurring).

Congress has passed several statutes limiting the use of the military in enforcing the civil law. As already noted, 18 U.S.C. § 1385 makes it a crime for anyone, "except in cases and circumstances expressly authorized by the Constitution or Act of Congress . . . [to use] any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws." Title 10 U.S.C. §§ 331-335 delimit the circumstances under which the President may call upon the national guard or military to suppress insurrection or domestic violence. See also 32 C.F.R. § 215 (1984).[8]

The Supreme Court has also recognized the constitutional limitations placed on military involvement in civilian affairs. A leading case is *Ex parte Milligan*, 4 Wall. 2, 124, 71 U.S. 2, 124, 18 L.Ed. 281 (1866), a Civil War case where the Court held that military commissions had no authority to try civilians in States not engaged in rebellion, in which the civil courts were open. More recently, in *Laird v. Tatum*, 408 U.S. 1, 15-16, 92 S.Ct. 2318, 2326-27, 33 L.Ed.2d 154 (1972), statements the Court made in dicta reaffirm these limitations:

> The concerns of the Executive and Legislative Branches . . . reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit

[8] In 1981 Congress passed legislation which specifies the circumstances under which the provision of indirect military assistance is permitted. 10 U.S.C. §§ 371-378; see also 32 C.F.R. § 213.10 (1984). We do not believe that this legislation is relevant to the reasonableness of the searches and seizures here, because they occurred over eight years before it was passed.

> prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military instrusion [*sic*] into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

The governmental interests favoring military assistance to civilian law enforcement are primarily twofold: first, to maintain order in times of domestic violence or rebellion; and second, to improve the efficiency of civilian law enforcement by giving it the benefit of military technologies, equipment, information, and training personnel. These interests can and have been accommodated by acts of Congress to the overriding interest of preserving civilian government and law enforcement. At the time of the Wounded Knee occupation, Congress had prohibited the use of the military to execute the civilian laws, except when expressly authorized. 18 U.S.C. § 1385. And it had placed specific limits on the President's power to use the national guard and military in emergency situations. 10 U.S.C. §§ 331-335. For example, under 10 U.S.C. § 332, the President may call upon the military only after having determined that domestic un-

rest makes it "impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings," and under 10 U.S.C. § 334, he may do so only after having issued a proclamation ordering the insurgents to disperse. Those steps were not taken here.

We believe that the limits established by Congress on the use of the military for civilian law enforcement provide a reliable guidepost by which to evaluate the reasonableness for Fourth Amendment purposes of the seizures and searches in question here. Congress has acted to establish reasonable limits on the President's use of military forces in emergency situations, and in doing so has circumscribed whatever, if any, inherent power the President may have had absent such legislation.[9] This is the teaching of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). There the President attempted to justify his seizure of the steel mills on grounds of inherent executive power to protect national security. Justice Black, writing for the Court, rejected this assertion of executive authority, and in addition four of the five judges concurring in the Court's opinion or judgment wrote separate opinions expressing the view that Congress had precluded the exercise of inherent executive authority by specifically refusing to give the President the power of seizure. 343 U.S. at 602, 72 S.Ct. at 893 (Frankfurter, J., concurring), 637-38, 72 S.Ct. at 871 (Jackson, J., concurring), 660, 72 S.Ct. at 882 (Burton, J., concurring), 662, 72 S.Ct. at 883 (Clark, J., concurring in the judgment).

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[9] See Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 Yale L.J. 130, 132-37 (1973).

B.

The District Court took the view that there is no "separate private cause of action for damages for the involvement of military personnel simply because they *were* military personnel. . . ." *Lamont v. Haig*, *supra*, 539 F. Supp. at 560 (emphasis in original). In large part, we agree. As will be seen shortly when we come to discuss plaintiff's allegations under the Due Process Clause of the Fifth Amendment, the essence of due process is that no governmental power, civilian or military, may be used to restrain the liberty of the citizen or seize his property otherwise than in accordance with the forms of law, including, in most instances, judicial proceedings. In the context of the Fourth Amendment, however, we believe plaintiffs' theory that the use of military force is in a class by itself has merit. The legal traditions which we have briefly summarized establish that the use of military force for domestic law-enforcement purposes is in a special category, and that both the courts and Congress have been alert to keep it there. In short, if the use of military personnel is both unauthorized by any statute, and contrary to a specific criminal prohibition, and if citizens are seized or searched by military means in such a case, we have no hesitation in declaring that such searches and seizures are constitutionally "unreasonable." We do not mean to say that every search or seizure that violates a statute of any kind is necessarily a violation of the Fourth Amendment. But the statute prohibiting (if the allegations in the complaint can be proved) the conduct engaged in by defendants here is, as we have attempted to explain, not just any act of Congress. It is the embodiment of a long tradition of suspicion and

hostility towards the use of military force for domestic purposes.

Plaintiffs' Fourth Amendment case, therefore, must stand or fall on the proposition that military activity in connection with the occupation of Wounded Knee violated the Posse Comitatus Act.

In *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977), we specifically held that military assistance given to civilian authorities at Wounded Knee did not violate this statute. (Surprisingly, neither side cites or discusses *Casper* in its brief on this appeal.) In *Casper*, several defendants who were convicted of attempting to interfere with United States Marshals and FBI agents during the Wounded Knee disorder appealed their convictions on the ground that the District Court had erred in rejecting their defense that the federal officials allegedly interfered with had been acting in violation of the Posse Comitatus Act. Specifically, the District Court had found on a stipulated record that the following activities did not violate the Act: the use of Air Force personnel, planes, and cameras to fly surveillance; the advice of military officers in dealing with the disorder; and the furnishing of equipment and supplies. *United States v. McArthur*, 419 F. Supp. 186, 194-95 (D.N.D. 1976). We affirmed "on the basis of the trial court's thorough and well-reasoned opinion." 541 F.2d at 1276.

Plaintiffs in the present civil action were not parties in this prior criminal case, nor were defendants here, with perhaps one or two exceptions, among the federal officials with whom interference was charged in the criminal prosecution. Therefore, our judgment in *Casper* does not estop plaintiffs to relitigate

the question whether a violation of the Posse Comitatus Act occurred at Wounded Knee. *Casper* does, however, stand as a binding precedent in this Circuit on the interpretation of the Act. Therefore, unless plaintiffs now allege that the defendants took actions that went beyond those alleged in the *Casper* case, the actions alleged in the complaint now before us cannot violate the Act.

In *Casper*, quoting from Judge VanSickle's opinion for the District Court, 419 F. Supp. at 194, we approved the following standard for determining whether a violation of the Posse Comitatus Act had occurred:

> Were Army or Air Force personnel used by the civilian law enforcement officers at Wounded Knee in such a manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively?

541 F.2d at 1278. This formulation, see 419 F. Supp. at 194 n.4, is based on language found in the Supreme Court's opinion in *Laird v. Tatum*, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154 (1972). *Laird* involved a claim that First Amendment rights were chilled by the existence of a data-gathering system maintained by Army Intelligence, a system described by plaintiffs in that case as involving the surveillance of lawful civilian political activity. The Court rejected this claim on the ground that no justiciable controversy existed. It held that the mere existence of this challenged data-gathering system infringed no rights of plaintiffs, since there had been no showing of objective harm or threat of specific future harm.

When this concept is transplanted into the present legal context, we take it to mean that military involvement, even when not expressly authorized by the Constitution or a statute, does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief. A mere threat of some future injury would be insufficient. In addition, our affirmance of the District Court's judgment in *McArthur* and our description of its opinion as "thorough and well reasoned," 541 F.2d at 1276, must also mean that the mere furnishing of materials and supplies cannot violate the statute. The same thing is true, as we have previously noted, of the use of military personnel, planes, and cameras to fly surveillance and the advice of military officers in dealing with the disorder, advice, that is, as distinguished from active participation or direction.

The question becomes, then, whether the present complaint alleges more than these kinds of activities. "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) (footnote omitted). We are not persuaded that this stringent requirement for dismissal on the pleadings has been met here. We of course have no way of knowing what plaintiffs would be able to prove if this case goes to trial, but the complaint, considered simply as a pleading, goes well beyond an allegation that defendants simply furnished supplies, aerial surveillance, and advice. It specifically charges

that "the several Defendants maintained or caused to be maintained roadblocks and armed patrols constituting an armed perimeter around the village of Wounded Knee. . . ." Paragraph 17(a), D.R. 33. Defendants' actions, it is charged, "seized, confined, and made prisoners [of plaintiffs] against their will . . . ." Paragraph 18, D.R. 34. These allegations amount to a claim that defendants' activities, allegedly in violation of the Posse Comitatus Act, were "regulatory, proscriptive, or compulsory," in the sense that these activities directly restrained plaintiff's freedom of movement. No more is required to survive a motion to dismiss. We hold, therefore, that plaintiffs' first set of claims, alleging an unreasonable seizure in violation of the Fourth Amendment because of defendants' confinement of plaintiffs within an armed perimeter, does state a cause of action.[10]

As to the second set of claims, we hold that they do not state a cause of action. In these claims, set out in paragraph 24 of the complaint, D.R. 38, plaintiffs charge that they were searched and subjected to surveillance against their will by aerial photographic and visual search and surveillance. As we have already noted, *Casper* holds that this sort of activity does not violate the Posse Comitatus Act. It is therefore not "unreasonable" for Fourth Amendment pur-

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[10] Since plaintiffs have stated a claim under the Fourth Amendment for unreasonable seizures, we need not also determine whether the complaint sufficiently alleges a violation of plaintiffs' constitutional right to travel. This right, even if applicable, is substantially covered by the Fourth Amendment claim. Plaintiffs' broad allegations will be subject to dismissal on a motion for summary judgment if they are unable to produce any evidence or affidavits showing that defendants' conduct here went beyond that before us in *Casper*.

poses. In addition, there is no allegation that this aerial surveillance occurred "in the area immediately surrounding the home" or in an area where plaintiffs had a legitimate expectation of privacy. See *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (no legitimate expectation of privacy for activities occurring in an open field; aerial surveillance of such an area, even if involving a trespass under state property law, is not an unreasonable search).

C.

The third set of claims invokes the Due Process Clause of the Fifth Amendment. Plaintiffs argue they were deprived of liberty, property, and, in the case of the son of one of the plaintiffs, life without due process of law. In the ordinary case, a claimed lack of due process relates to the absence of a notice and hearing or certain other procedural deficiencies. Plaintiffs' theory here is quite different. They claim a due-process violation by reason of the mere fact that the confinement and other deprivations inflicted upon them derived from military action instead of civilian. Plaintiffs cite a number of 19th-century cases which they say supports this view. *E.g., Ex Parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (Taney, C.J., in chambers) (1861). We have carefully examined each of these authorities and find in them no clear support for the novel theory advocated by plaintiffs. In *Merryman*, for example, the Chief Justice did mention the Due Process Clause of the Fifth Amendment, and the petitioner in that habeas corpus proceeding was in military custody, but the result in the case would have been exactly the same had the custody been civilian, because Merryman was seized and imprisoned without any judicial process. It was the absence of that process, rather than the military character of Merryman's custodian, that caused the Chief Justice to take the view that the petitioner was unconstitutionally confined.

Most of the other cases relied on by plaintiffs, as the District Court persuasively explained, 539 F. Supp. at 559-60, are ordinary tort actions in which the defendant set up as a defense that they were acting pursuant to military authority. Plaintiffs then contested the validity of this defense, and the courts sided with plaintiffs, but these holdings seem to be based rather on the theory that under the circumstances of each case the assertion of military power was simply unauthorized, rather than on any limitation on military power stemming from the Due Process Clause of the Fifth Amendment. To be sure, the proposition that a power delegated to an officer of the federal government cannot be exercised in such a way as to conflict with the Due Process Clause of the Fifth Amendment is not far removed from the proposition that no such power was ever delegated in the first place. See *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 646, 72 S.Ct. at 875 (Jackson, J., concurring). The two legal theories, however, remain analytically distinct, and plaintiffs' complaint here is clearly grounded on the due-process theory that an action by a military officer can violate the Fifth Amendment even though exactly the same thing, if done by a civilian federal official, would not. With this proposition we do not agree, nor do we believe that plaintiffs, ten years after the filing of their complaint, should be allowed to espouse a new theory of constitutional relief.

Our decision to reject plaintiffs' due-process theory is reinforced by the knowledge that all of the proof relevant under such a theory will still come in if and when the Fourth Amendment search-and-seizure theory goes to trial. In other words, plaintiffs do not really need the due-process theory in order to secure relief here, the Court having already held that an unauthorized action by a military officer can be "unreasonable" under the Fourth Amendment even though the same thing, if done by a civilian official, would not.

III.

The defendants argue that the dismissal of the plaintiffs' claims can be affirmed on two alternative grounds: first, that certain of the defendants were not properly served; second, that the action is barred by the statute of limitations. We decline to reach either issue at this time. The service-of-process issue has not been ruled on by the District Court. No materials on the issue were included in the designated record, and no factual findings of the District Court with respect to it are available for review. The limitations question is also not sufficiently developed for appellate review. It is primarily based on the claim that the plaintiffs' action was not commenced within the statutory period because the defendants have not been properly served. This argument again requires reference to materials concerning service that are not part of the record on appeal. Defendants are of course free to renew these defenses on remand.

IV.

In short, we hold that with one exception the District Court correctly ruled that the complaint failed to state a claim. This exception relates to the allega-

tion that defendants seized and confined plaintiffs within an armed perimeter, that these actions were not authorized by law and were a violation of the Posse Comitatus Act, and that, therefore, an "unreasonable" seizure within the meaning of the Fourth Amendment took place. As to this single theory, we hold that the complaint states a claim on which relief can be granted. On remand, further proceedings consistent with this opinion will take place. We note that the alleged wrongs complained of by plaintiffs occurred in 1973, and that their original complaint was filed on February 27, 1975. It has taken more than ten years to litigate the question whether the complaint is sufficient as a matter of pleading. The history of this case reflects no credit either on the lawyers or on the courts. We ask the District Court, on remand, to act with dispatch in conducting whatever further proceedings are appropriate.

Reversed and remanded with instructions.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civil No. 81-5048

RE: AGNES LAMONT, GLADYS BISSONETTE, ELLEN MOVES CAMP, EUGENE WHITE HAWK, MARVIN GHOST BEAR, EDGAR BEAR RUNNER, OSCAR BEAR RUNNER, SEVERT YOUNG BEAR, RACHEL WHITE DRESS, HELEN RED FEATHER, EDDIE WHITE DRESS, VICKI LITTLE MOON, MADONNA GILBERT, LORELEI MEANS, and CARLA BLAKEY, PLAINTIFFS

vs.

ALEXANDER HAIG, RICHARD G. KLEINDIENST, JOSEPH T. SNEED, CHARLES D. ABLARD, JOSEPH H. TRIMBACH, RALPH E. ERICKSON, HARLINGTON WOOD, JR., KENNETH BELIEU, ROLLAND GLESZER, EDMUND EDWARDS, JOHN HAY, and VOLNEY F. WARNER, DEFENDANTS.

Oct. 18, 1984

TO COUNSEL OF RECORD:

MEMORANDUM OPINION

In its earlier opinion in this case, *Lamont v. Haig*, 539 F.Supp. 552 (D.S.D. 1982), this court rejected

plaintiffs' claims both that there was a private cause of action under several criminal statutes including, most notably, the Posse Comitatus Act, 18 U.S.C. § 1385, and that there was an implied right under the United States Constitution to be "free of the use of the military in the enforcement of civil laws." 539 F.Supp. at 559. This court concluded that "the mere enforcement of the law by officials who happen to be members of the military, and involving no infringement of a citizen's recognized constitutional rights, does not present a constitutional violation giving rise to a private cause of action." 539 F.Supp. at 560. The court then directed plaintiffs to redraw the allegations of the complaint so as to assert causes of action under the First, Fourth and Fifth Amendments.

Plaintiffs did file a Second Amended Complaint, which set out the factual basis for the complaint more completely, but made the repeated allegation that the actions of defendants were unlawful under the Constitution "for the reason that defendants accomplished or caused to be accomplished those actions by means of the unconstitutional and felonious use of parts of the United States Army or Air Force, without any legal authority and contrary to Title 18 U.S.C. Section 1385 and other provisions of law." Defendants filed another motion to dismiss on the grounds plaintiffs had essentially done nothing more than assert, in a slightly different form, the same legal theory already rejected by this court. Plaintiffs' response to this has been to contend that they no longer argue that "the mere fact of defendants' . . . use of parts of the [military] constituted *per se* an actionable injury to these plaintiffs." Plaintiffs' Memorandum filed April 6, 1984 at 9. Plaintiffs, however, take the position that "the circumstances which rendered the

defendants' injurious acts unconstitutional and therefore actionable was those defendants' felonious use, as the means for accomplishing those injurious acts, of parts of the United States Army and Air Force." *Id.* at 9-10. In plaintiffs' view, the question of whether their complaint states a claim "depends upon whether injuries inflicted by federal government officials, although they might *otherwise* have been lawful and non-actionable, are rendered unlawful, unconstitutional and actionable solely 'for the reason that' those acts are accomplished by means which are felonious—at least where, as here, the felony consists of their use of parts of the Armed Forces in defiance of the Posse Comitatus Act." *Id.* at 10-11.

Plaintiffs thus seem to have elected to forego any recovery they might have due them under several widely accepted constitutional tort theories, *see Lamont, supra*, at 539 F.Supp. at 560, and to insist, seemingly as a matter of academic principle, that this case be tried on theories of their own concoction. The court is of the view that plaintiffs are poorly served by such a strategy. In view of the unwavering firmness of plaintiffs' position, however, the court has no choice but to consider the validity of the complaint in the light urged by plaintiffs. It is in this light, moreover, that the court must find that the complaint fails to state a claim, and that it must be dismissed.

Plaintiffs now claim that they no longer seek to assert a private cause of action under 18 U.S.C. § 1385, but argue instead that the fact a violation of § 1385 took place (accepting plaintiffs' allegations as true) somehow transforms those actions into a violation of constitutional rights. Plaintiffs argue that there "is no precedent for holding that the use by federal officials of *felonious* means to confine,

surveil, search, or constrain citizens is lawful under the Constitution." The point, however, is that plaintiff has cited no authority, beyond the same unpersuasive scattering of nineteenth century cases previously advanced in connection with plaintiffs' prior constitutional arguments, *Lamont, supra*, 539 F.Supp. at 559, to *support* this contention. The court is simply unable to accept the proposition that, because Congress has chosen to put statutory limits on the actions of governmental officials, any act that goes beyond these limits is thereby an automatic violation of the Constitution.

An analogous situation has arisen in criminal cases like *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this court holds to be necessary upon federal constitutional standards") and *Cooper v. California*, 386 U.S. 58, 62 (1967) ("our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constittuion if it chooses to do so.") Just as a state may impose greater restrictions on police activity than that required under the Constitution, so may Congress also impose greater restrictions on the ability of the federal government to enforce laws than are imposed on those officials by the Constitution itself. As this court has already held in its earlier opinion in this case, the Constitution itself does not prohibit the use of the military in civil law enforcement. Congress has, and quite wisely in this court's opinion, imposed this restriction by means of 18 U.S.C. § 1385. Congress did not, however, provide a private cause of action for violations of that statute. *Lamont, supra*, 539 F.Supp. at 558. Thus, even as-

suming defendants were all guilty of § 1385 violations, this fact provides no basis for plaintiffs' claim. Under these circumstances, the court is obliged to dismiss plaintiffs' action for failure to state a claim upon which relief may be granted.[1]

BY THE COURT:

/s/ Donald J. Porter
United States District Judge

[1] In view of this result, it is unnecessary to reach the question of the sufficiency of process on defendants.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, W.D.

Civ. A. No. 81-5048

AGNES LAMONT; GLADYS BISSONETTE; ELLEN MOVES CAMP; EUGENE HAWK; MARVIN GHOST BEAR; EDGAR BEAR RUNNER; OSCAR BEAR RUNNER; SEVERT YOUNG BEAR; RACHEL WHITE DRESS; HELEN RED FEATHER; EDDIE WHITE DRESS; VICKI LITTLE MOON; MADONNA GILBERT; LORELEI MEANS, and CARLA BLAKEY, PLAINTIFFS

v.

ALEXANDER HAIG; WAYNE COLBURN; RICHARD KLEINDIENST; JOSEPH T. SNEED; CHARLES D. ABLARD; JOSEPH H. TRIMBACH; RALPH E. ERICKSON; HARLINGTON WOOD, JR.; KENNETH BELIEU; ROLLAND GLESZER; EDMUND EDWARDS; JOHN HAY; and VOLNEY F. WARNER, DEFENDANTS

May 24, 1982

MEMORANDUM OPINION

DONALD J. PORTER, District Judge.

CASE SUMMARY

Defendants moved to dismiss this case on the grounds that there is a lack of personal jurisdiction over defendants, that the allegations of the complaint are vague, conclusory, and insufficient, and that the

plaintiffs have failed to state a claim as to either their claim for violations of their constitutional rights or their claim for violations of several federal criminal statutes, including the Posse Comitatus Act, 18 U.S.C. § 1385. After due consideration of the briefs and argument of the parties, the Court must find that it does presently lack jurisdiction over all but one of the defendants, but that plaintiffs will be given an opportunity to make proper service. The Court also finds that the complaint does not state a cause of action under the criminal statutes urged. The Court does find, however, that a constitutional cause of action is stated, but that plaintiffs will be required to amend their complaint because of the vague and conclusory nature of their allegations.

BACKGROUND

Six years after its filing in the District of Columbia, *see Lamont v. Haig*, 590 F.2d 1124 (D.C. Cir.1978), this action was transferred in 1981 to the District of South Dakota under 28 U.S.C. § 1406(a). At that time, defendants renewed their motion for judgment on the pleadings, raising a number of arguments which had been urged at various times in the course of the litigation but were never decided.

The complaint arises from the Indian occupation of Wounded Knee, South Dakota, in 1973. Plaintiffs are all apparently residents of Wounded Knee who were, they allege, kept from their homes in that village or forcibly confined in the village while it was surrounded by federal law enforcement officers. The principal claim of plaintiffs is that the substantial use of military personnel in support of the government activity, which was, plaintiffs claim, engineered by defendants, violated an implied constitutional right of plaintiffs to be free from the use of the military to enforce civil laws. Plaintiffs also allege that they are entitled to sue for damages for violations of 18 U.S.C. § 1385, which prohibits the use of the military "as a posse comitatus, or otherwise to execute the law." [1]

DISCUSSION

I.

The initial grounds for dismissal urged by defendants is that this Court lacks personal jurisdiction over all defendants, except for defendant Ablard, who was personally served in the District of Columbia and about whom there is apparently no dispute. Defendants' contention is two-fold, relating as it does to claims that the service of process on certain defendants of the original complaint was insufficient under Rule 4, as well as claims that service purporting to be based on the District of Columbia long-arm statute was invalid. The Court finds considerable merit to these claims, and must rule that, except for Ablard, plaintiffs have failed to make proper service on defendants.

Service Under the District of Columbia Long-Arm Statute.

Plaintiffs rely on the provisions of the District of Columbia Code §§ 13-422, 13-423(a)(1), as the basis

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[1] Some exploration of § 1385 was done in several of the criminal cases arising from the Wounded Knee incident. *See United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1976); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975); *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974); *United States v. Jaramillo*, 380 F. Supp. 1375 (D.Neb. 1974).

for their authority to serve the original complaint on defendants Warner, Trimbach, Erickson and Wood. (Plaintiffs also contend that their failure to serve defendants Kleindienst and Sneed with the original complaint was cured by service of the amended complaint on these defendants under these Code sections). Plaintiffs further rely on these statutes for their service on all defendants, except Ablard, of the amended complaint.

Under Rule 4(f), service beyond the state in which the District Court is located can be made only when "authorized by a statute of the United States or by these rules. "Rule 4(e) allows for out-of-state service [w]henever a statute or rule of court of the state in which the district court is held [so] provides." The particular sections of the District of Columbia jurisdictional statutes upon which plaintiffs rely are:

> § 13-422. A District of Columbia court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, the District of Columbia as to any claim for relief.
>
> § 13-423. (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> > (1) transacting any business in the District of Columbia;

As to § 13-422, plaintiffs argue that the "critical time" for the purposes of the statute is the time when the acts giving rise to the claim took place, not when the process is actually served. In other words, plaintiffs claim, because ten of the defendants were either domiciled in or maintained their principal place of business in the District of Columbia in 1973, they were still subject to the jurisdiction of the courts there in 1975 when the complaint was filed, even though they had left the District of Columbia by that time. Plaintiffs cite no cases in support of this interpretation, and the statute itself is phrased only in the present tense: the court "may *exercise* personal jurisdiction over a person domiciled in the District" (emphasis supplied). This would appear to mean nothing more than the simple assertion that the District can exercise jurisdiction over its citizens even when they are temporarily out of the District, and indicates that the *exercise*, i.e., service of process, is to take place over persons *then* domiciled in the District. *Securities & Exchange Commission v. Gilbert*, 82 F.R.D. 723, 726 (S.D.N.Y.1979) ("jurisdiction attached only when a defendant is properly served with the summons and complaint in an action.") If the drafters of § 13-422 had meant that the District of Columbia courts could exercise jurisdiction over all persons who were now and had been in the past domiciled in the District, an extraordinarily broad assertion of jurisdiction of questionable validity under due process, the language providing for such an assertion would have been inserted into the statute. As these statutes are now worded, the Court interprets them to mean that the only means of gaining jurisdiction over persons not now domiciled in the District must be by way of § 13-423.

Plaintiffs' reliance on § 13-423(a)(1) is also misplaced. It may be true that the activities of many of defendants in the District of Columbia amounted to the "transacting of business" with respect to the acts

alleged in the complaint, and that a claim of personal jurisdiction could otherwise be made under this section, but this statute has been so construed by the District of Columbia courts as to render it inapplicable to this fact situation. Though cited by neither plaintiffs nor defendants, the case of *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C.1973), considered a claim of personal jurisdiction under § 13-423(a)(1) and another sub-section of that statute. The court expressly held that "[u]nder the District of Columbia 'long-arm' provisions above quoted, *both the act and the effect, or injury, must take place in the District.*" 359 F.Supp. at 695 (emphasis supplied). This Court might not have reached the same construction of the statute had it been free to consider the section without the holding in *Mandelkorn*, but it must be assumed that the District of Columbia courts possess greater expertise in the interpretation of their statutes, and this Court will accordingly follow *Mandelkorn*. Since it is obvious that the injuries plaintiffs are alleged to have suffered as a result of defendants' acts took place in Wounded Knee, South Dakota, any assertion of personal jurisdiction under § 13-423(a)(1) must be rejected.

Service on Military Defendants under 32 C.F.R. § 516.1(e)(2).

Plaintiffs were unable to obtain direct personal service upon defendants, Gleszer Edwards, Hay and Haig, who were all either active or retired military personnel at the time the original complaint was filed in 1975. Plaintiffs instead served certain individuals in the military in Washington, D.C., contending that these were persons "authorized . . . by law to receive service of process", Rule 4(d)(1), for de-

fendants Gleszer, Edward, Hay and Haig. The provisions of law on which plaintiffs rely for this appointment is 32 C.F.R. § 516.1(e)(2), the pertinent parts of which are set forth in the margin.[3]

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[3] 32 C.F.R. § 516.1(e)

(2) Civil process.

(i) The service of process is not a function of the Department of the Army or of its military personnel or civilian employees in their official capacity, except when required by treaty or international agreement. It is the policy of the Department of the Army, however, to assist civil officials in the service of process as provided in paragraphs (e)(2)(iii) and (iv) of this section.

(ii) Commanders and other Army officials will not prevent or evade the service of process in legal actions brought against the United States or themselves concerning their official duties. If acceptance of service of process would interfere with the performance of his military duties, a commander or other official may designate a representative to accept service in his stead.

(iii) Service of civil process within the United States, its territories and possessions is as follows:

(a) Process of Federal Courts. Service of process is accomplished in accordance with the rules of the Federal court concerned (38 U.S.C. appendix). Installation commanders may impose reasonable restrictions upon persons who enter their installations to serve the process.

(b) Process of State courts in areas of exclusive Federal jurisdiction not subject to the right to serve process. Commanders or other Army officials in charge will bring the matter to the attention of the individual requested to be served and will determine whether he wishes to accept service voluntarily in accordance with the laws of the State issuing the process. Judge advocates or other competent officials will inform the individual of the legal effect of voluntary acceptance of service. If the individual does not desire to accept service, the party requesting

A close reading of these regulations does not support plaintiffs' argument that these authorize service on a member of the military other than on defendants themselves. First, sub-section (e)(2)(iii)(a), which explicitly relates to the process of *federal* courts, appears to provide only for allowing persons to enter a military installation to make service under Federal court rules. Nothing in this subsection establishes a procedure in which one officer of the military could accept service for another officer. Second, even ac-

---

such service will be notified and will be informed that the nature of the jurisdiction precluded service by State authorities on the military installation.

(c) Process of State courts in areas of exclusive Federal jurisdiction in which the right to service process is reserved by, or granted to, the State or States, in areas of concurrent jurisdiction, and in areas in which the United States has only a proprietorial interest.

If Army officials are asked to serve process, they may proceed as in paragraph (e)(2)(iii)(b) of this section. If the individual declines to accept service, the requesting party will be so notified and will be informed that he may proceed through authorities authorized to serve process by the applicable State law. Civil officials authorized by applicable State law will be permitted, upon proper application, to enter areas subject to the right to serve process for the purpose of making service. Commanders or other Army officials in charge will assist the civil officials by making military personnel or civilian employees available for service of process, subject to reasonable limitations. In addition, civil officials may enter areas subject to the right to serve process for the purpose of levy on and the subsequent sale of personal property of personnel residing thereon, subject to reasonable limitations. This authority does not extend, however, to the levy on or the sale of personal property essential to or proper for the use of military personnel or civilian employees in the performance of their official duties.

cepting plaintiffs' argument that subsections (3)(2)(iii)(b) & (c) are applicable here, relating as they do to service of *state* courts, all that either of the subsections provide is that an Army official will "bring the matter to the attention of the individual requested to be served and will determine whether he wishes to accept service voluntarily." The regulation does not provide that the army official will actually take the summons and complaint and serve it on the defendant; such an interpretation would, in fact, conflict with the general language of (e)(2)(i), that "service of process is not a function of the Department of the Army or of its military personnel or civilian employees." Subsections (e)(2)(iii)(b) & (c) appear to merely set forth a procedure whereby military personnel can be made available for process, not that certain officers themselves will take on the function of process servers. Finally, subsection (e)(2)(ii) provides that "a commander or other official *may* designate a representative to accept service in his stead" (emphasis supplied). Plaintiffs have produced nothing beyond the bare language of this regulation and generalized references to "common practice" in their brief to indicate that any of the defendants here designated the officers actually served as their "representatives to accept service." The Court must find, then, that plaintiffs failed to comply with Rule 4 in their service of these defendants, and that Gleszer, Edwards, Hay and Haig have not yet been brought before this Court.

Service on Defendants' Secretaries.

Service of the original complaint on defendants Colburn and Belieu was purported to have been effected on their secretaries at their places of busi-

ness in Washington, D.C. Both defendants have filed affidavits, Belieu stating that his secretary had not "been authorized or appointed by me to accept or receive service of process in my behalf", and Colburn stating that he had not authorized his secretary "to accept service of process on my behalf when I have been sued in my personal capacity."

As with the preceding section of this opinion, the governing law is Rule 4(d)(1):

> Service shall be made
>
> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Defendants Colburn and Belieu were not personally served. "Clearly, leaving process at defendants' place of employment does not qualify under the dwelling house or place of abode method." *Gipson* v. *Township of Bass River*, 82 F.R.D. 122, 125 (D.N.J.1979). As to service on an agent, the "cases dealing with agency by appointment indicate that an actual appointment for the specific purpose of receiving process normally is expected . . . protestations by an agent that he has authority to receive process or the fact that an agent actually accepts process is not enough to bind defendant; there must be evidence that defendant himself intended to confer such authority upon the agent." 4 Wright & Miller, *Federal Practice and*

Procedure, 371-72 (1969). Plaintiffs have presented no evidence that defendants Colburn and Belieu intended to appoint their secretaries to receive service in a case such as this[3], and in the absence of such evidence, it must be found that neither Colburn nor Belieu have been brought before this Court.

It is the finding of the Court, then, that personal service has not yet been effectively made on defendants Gleszer, Edwards, Hay, Warner, Haig, Colburn, Kleindienst, Sneed, Trimbach, Erickson, Wood and Belieu. Defendants urge that the case against them be therefore dismissed. "However, when presented with insufficient service of process . . . the court has broad discretion to dismiss the action *or* to retain the case but quash the service that has been made on the defendant. . . . The latter course is the one this court will follow, since there is a reasonable prospect that plaintiff ultimately will be able to serve defendants

---

[3] Plaintiffs seize upon the phrase in Colburn's affidavit that his secretary was not authorized to accept process in suits against Colburn in his "personal capacity", and imply from this that she was his agent to accept service in Colburn's official capacity. Plaintiffs then seek to avoid the problem that this case is brought against defendants as individuals by insisting that, while individual liability is sought, the case relates to unlawful acts done in Colburn's official capacity. Rule 4, however, clearly distinguishes between service on an individual and service on United States officers in their official capacity, *compare* Rule 4(d)(1) with Rule 4(d)(5), and it is evident that an officer could designate his secretary as his agent to receive service in the one type of suit while giving her no authorization to accept service in the other type of suit. *See Micklus v. Carlson*, 632 F.2d 227, 240 (3rd Cir. 1980) ("Where money damages are sought from a public official in his individual capacity, service . . . under Rule 4(d)(5) is insufficient . . . the plaintiff must proceed under the terms of Rule 4(d)(1) and effect personal service.")

properly." *Gipson v. Township of Bass River*, 82 F.R.D. 122, 126 (D.N.J.1979). (Emphasis in original) Plaintiffs are therefore granted sixty days from the date of the filing of their additional amended complaint, as provided in a later section of this opinion, to make service on these defendants under the South Dakota long-arm statute, SDCL 15-7-1 *et seq.*[4]

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[4] The Court must also deny defendants' motion to dismiss on the ground that because of the lack of sufficient service, this action is now barred by the statute of limitations. The case was properly filed as a federal cause of action on February 27, 1975 in the District of Columbia. Under the prevailing interpretations, the Federal Rules of Civil Procedure do

> not intend that the mere lapse of time between filing the complaint and service of process affects the validity of the service or causes the action to abate. Under the Rules, so long as the action pends, process Remains [sic] alive until it is effectively served . . . *If process is served on the wrong person, or otherwise improperly served, the action does not die; rather a new summons should be issued and good service attempted.*

2 Moore's Federal Practice 4-76-4-78 (2d ed. 1981) (emphasis supplied). *See also Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gas Co.*, 347 F.2d 921 (8th Cir. 1965) ; *Tripplett v. Azordean*, 478 F. Supp. 872 (N.D.Ia. 1977). The Court must, of course, look to the most analogous state statute to fix the period of limitations. While it is unclear whether this statute is to be adopted from the laws of the District of Columbia or South Dakota, it is evident that under the laws of either forum the case was timely filed. The first of defendants' acts alleged in the complaint took place on February 28, 1973, and continued into March, 1973. As noted before, the case was filed on February 27, 1975. Thus, even if the shortest of the limitation periods cited to the Court, SDCL 15-2-15(1) were applied, this case would still have been filed in time.

Some cases indicate that "due diligence" in service is also required to toll the statute. This position has been expressly rejected in this Circuit in *Moore, supra*. Even if it were necessary to show diligence of service, however, the Court is satisfied that plaintiffs' efforts to make service following the filing of the original complaint were sufficient to meet this requirement.

II.

Plaintiffs have alleged causes of action under four federal criminal statutes, 18 U.S.C. §§ 2, 241, 371 and 1385. The great weight of authority is that neither § 241 nor § 371 provide private causes of action. "Section . . . 241 . . . of Title 18 provide[s] criminal remedies for the violation of certain constitutional rights, not a private cause of action." *Sauls* v. *Bristol-Myers Co.*, 462 F.Supp. 887, 889 (S.D.N.Y.1978). "With regard to the alleged violations of 18 U.S.C. § 241 . . . [and] 371 . . . plaintiff has failed to cite, and the court has been unable to locate, any authority which would support implying a civil cause of action for violations of these provisions. To the contrary, the case law indicates that violation of these statutes does not give rise to a civil cause of action." *Fiorino v. Turner*, 476 F.Supp. 962, 963 (D.Mass.1979).

> The two sections of Title 18, U.S.C., relied upon by the plaintiff relate to the criminal offenses of mail fraud and conspiracy to commit mail fraud.
>
> These provisions provide absolutely no jurisdictional basis for the plaintiff's claim because the prosecution of those criminal offenses has been entrusted solely to the federal government. Private litigants cannot sue to redress the offenses defined in Sections 371 and 1341 of Title 18 U.S.C.

Milburn v. Blackfrica Promotions, Inc., 392 F.Supp. 434, 435 (S.D.N.Y.1974). *See also Aldabe v. Aldabe*,

616 F.2d 1089 (9th Cir. 1980); *Means v. Wilson*, 383 F.Supp. 378 (D.S.D.1974), aff'd in part *and rev'd on other grounds*, 522 F.2d 833 (8th Cir. 1975), *cert. den.* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976); *Bryant v. Donnell*, 239 F.Supp. 681 (D.Tenn. 1965).

The Court has not located any such authority for 18 U.S.C. § 2 or the Posse Comitatus Act, 18 U.S.C. § 1385, on the latter of which plaintiffs place their primary reliance. The Court must then proceed to consider these statutes under the standards in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) and *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). A court's task is "limited solely to determining whether Congress intended to create [a] private right of action", *Touche Ross*, 442 U.S. at 568, 99 S.Ct. at 2485, in enacting the statutes. As in *Cort v. Ash*:

> Clearly, provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages. . . . However, in [cases in which a private cause of action was found], there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone. Here, there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone.

422 U.S. at 79-80, 95 S.Ct. at 2088-2089.

Sections 2 and 1385 are in fact bare criminal statutes, showing not the slightest indication of any legislative intent to create a private cause of action. No case appears to have ever discussed the possibility of private causes of action under these sections, let

alone make a finding that such a cause of action did exist. Plaintiffs briefed the legislative history of § 1385 at length, but were unable to produce any evidence of intent to create a private cause of action;[8] plaintiffs have failed entirely to show any authority for a cause of action under § 2. This "paucity of legislative intent or any other kind of evidence indicating intent to create a private cause of action forces this court to conclude Congress did not intend to create a private cause of action for plaintiffs under [these statutes]." *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1179 (6th Cir.1979). "[I]n such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private cause of action, has been answered in the negative", *Touche Ross*, 442 U.S. at 576, 99 S.Ct. at 2489, and this Court therefore need not consider any of the other standards set forth in *Cort v. Ash*. *See Ryan*, 611 F.2d at 1179. To the extent plaintiffs' complaint purports to state a cause of action under 18 U.S.C. §§ 2, 241, 371, and 1385, then, it is dismissed.

III.

The central legal issue in this case is plaintiff's [*sic*] stridently urged assertion that the "single most ancient and most fundamental element of 'due process

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[8] Plaintiffs primarily seek to evade this point with an argument that Congress did not intend § 1385 to abrogate a "traditional remedy in civil damages available through personal action brought by the person or persons alleging injury from prohibited use of the military." As the succeeding portion of this opinion will demonstrate, no such "traditional remedy" exists, and there is thus no question whether § 1385 extinguished a pre-existing action.

of law' " is the right to be free of the use of the military in the enforcement of civil laws. Plaintiffs have incorporated much historical material in their argument, including the Magna Carta, the Peasant's Revolt in England in 1381, the struggle between Charles I and Parliament, the Boston Massacre, our own Civil War, Reconstruction, the 1876 Presidential election, and Kent State. While this does emphasize a tradition of Anglo-American distrust of military involvement in civilian affairs, *see Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972), which this Court has no wish to denigrate, plaintiffs can point to remarkably little legal precedent in support of their claims. As defendants observe, and plaintiffs apparently concede, none of the nineteenth century cases relied upon by plaintiffs, such as *Wise v. Withers*, 7 U.S. (3 Cr.) [*sic*] 330, 2 L.Ed. 457 (1806), make any discussion of any such constitutional guarantee; rather the most these cases do is support the familiar proposition that members of the military, like other public officials, are subject to suit for their individual commission of common-law torts.[6]

Plaintiffs, at oral argument on these motions, tried to minimize the significance of the tort aspect of these cases by the argument that before the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the federal courts were able to protect constitutional rights, including this

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[6] *See also Smith v. Shaw*, 12 Johns. 222 [257] (N.Y. 1815); *McConnell v. Hampton*, 12 Johns. 203 [234] (N.Y. 1815); *Hyde v. Melvin*, 11 Johns. 424 [521] (N.Y. 1814); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866); *Beckwith v. Bean*, 98 U.S. 266, 25 L.Ed. 124 (1878); *Milligan v. Hovey*, 17 F.Cas. 380 (No. 9605) (C.C.D. Ind. 1871); *Johnson v. Jones*, 44 Ill. 142 (1867); *Griffin v. Wilcox*, 21 Ind. 370 (1863).

right against civil law enforcement by the military, through the application of federal common law. To repair the loss of the body of federal common law as a result of *Erie*, so this argument continues, the federal courts devised constitutional actions along the line of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and that plaintiffs' right against military execution of the laws is one of these common-law torts that should now be perceived as having constitutional dimensions.

This Court does not take the view that the growth of private litigation in federal courts to vindicate constitutional rights can be so easily explained. In any case, there is one fundamental flaw in plaintiff's [*sic*] argument, both as it relates to the nineteenth century common-law tort cases and, indeed, plaintiffs' entire theory of a personally enforceable due process right against military involvement in civil law enforcement. The Court has been unable to locate any authority in plaintiffs' cases or the historical incidents cited that would be authority for the proposition that some one *means* of government activity can be branded as so inherently evil that its very use is in and of itself a violation of due process, *regardless* of whether the activity had any impact on a litigant or his property, or his recognized Constitutional and common-law rights. To establish, as plaintiff seeks to do, such a generalized right against the use of a particular governmental activity per se, without ever looking to see what effect that activity actually has on people and property, appears very much like creating a right in a vacuum.

It is what the King was having done to his subjects or their property, far more than the mere fact that the King was using his knights rather than setting

up some civil law enforcement group to accomplish his will, that would seem to be the reason underlying the Magna Carta, or all the Parliamentary protests cited by plaintiffs.[7]

Plaintiffs do allege specific constitutional violations under the First, Fourth and Fifth Amendments, including deprivations of their liberty, freedom of movement, right to travel, right of assembly, right to petition the government for redress of grievances, right to the free exercise of religion, right to privacy, and right to be free from unreasonable search, surveillance, seizure and imprisonment. Violations of these rights are properly the subject of a suit such as this, *see Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (Fifth Amendment suits); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Fourth Amendment suits); *Dellums v. Powell*, 566 F.2d 167 (D.C.Cir.1977), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978) (First Amendment suits), and it is on this basis that the Court denies defendants' Motion to Dismiss for failure to state a claim. But to the extent plaintiffs rely on an entirely separate private cause of action for damages for the involvement of military personnel simply because they *were* military personnel, at

[7] In somewhat more mundane legal terms, this reasoning is analogous to the principle that the infliction of a tort by a person who happens to be a public official does not raise the occurrence to constitutional dimensions merely because of the tortfeasor's public capacity. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Just so, the mere enforcement of the law by officials who happen to be members of the military and involving no infringement of a citizen's recognized constitutional rights, does not present a constitutional violation giving rise to a private cause of action.

Wounded Knee, plaintiff's [*sic*] complaint is dismissed.

Again, the Court wishes to emphasize that it does not reject the valuable tradition in our legal system against allowing the military to participate in civilian affairs. Nor would the Court advocate the repeal of the statutory prohibition against military execution of the laws at 18 U.S.C. § 1385. And the violation of some specific constitutional right by members of the military, like those alleged in the complaint, certainly can be addressed by this Court.

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in [the] decided cases . . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Laird v. Tatum, 408 U.S. 1, 15-16, 92 S.Ct. 2318, 2326-2327, 33 L.Ed.2d 154 (1972).

The Court holds only today that the rights already recognized in the Constitution and mentioned above are protected against *all* government interference, and there is no basis for selecting one form of government activity and elevating any use of it, no matter what the outcome, into a separate constitutional violation upon which a private cause of action may be brought.

IV.

The Court comes finally to defendants' assertion that the allegations of the complaint are vague, con-

clusory, and insufficient, relying on the case, among others, of *Anderson v. Sixth Judicial Circuit*, 521 F.2d 420 (8th Cir. 1975): "[w]hile pleadings in civil rights cases are to be liberally construed . . . they must contain more than mere conclusory statements and a prayer for relief . . . [w]hile plaintiffs argue that [defendants' practices] violate their constitutional rights, they set forth no facts in support of their allegations." 521 F.2d at 420-21.

As defendants point out, only plaintiffs Oscar Bear Runner and Young Bear allege that they were in Wounded Knee throughout the incident there. Lamont, Bissonette, Moves Camp, Gilbert, and Means allege presence in Wounded Knee, but for unspecified portions of the duration of the incident. White Hawk, Ghost Bear, Edgar Bear Runner, Rachel White Dress, Red Feather, Eddie White Dress, and Little Moon allege only that they were presently residents of Wounded Knee. Blakely alleges only that she is an Indian. Of all these plaintiffs, only Lamont has in any way specified her injury, in that she alleges the death of her son as a result of defendants' acts. This Court must agree that these allegations are insufficient.

Plaintiffs' complaint is largely devoted to detailed allegations about the formulation of the plans for the use of the military around Wounded Knee, the deployment of these forces, and their various uses during the incident. As the preceding section of this opinion demonstrated, this *alone* does not make out a violation of plaintiffs' constitutional rights.

It is therefore ordered that plaintiffs must, within forty days from the date of this opinion, file an amended complaint to cure the flaws herein noted.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2617SD

GLADYS BISSONETTE, ET AL., APPELLANTS

v.

ALEXANDER HAIG, ET AL., APPELLEES

Appeal from the United States District Court for the District of South Dakota

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Sept. 16, 1986

[Filed Oct. 15, 1986]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

/s/ Robert D. St. Vrain

A True Copy.
ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.
10/10/86

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-2553/2574-EM

THEODORE J. LOEFFLER, APPELLEE/CROSS APPELLANT

vs.

PAUL N. CARLIN, ETC., APPELLANT/CROSS APPELLEE

Appeals from the United States District Court
for the Eastern District of Missouri

No. 85-1301-NI

CHAUFFEURS, TEAMSTERS AND HELPERS, ETC.,
APPELLANT

vs.

C.R.S.T., INC. (SIC), APPELLEE

Appeal from the United States District Court
for the Northern District of Iowa

No. 84-2089-SI

REED WAYNE HAMILTON, APPELLANT

vs.

CRISPUS NIX, ETC., ET AL., APPELLEES

Appeal from the United States District Court
for the Southern District of Iowa

No. 84-2617-SD

GLADYS BISSONETTE, ET AL., APPELLANTS

vs.

ALEXANDER HAIG, ET AL., APPELLEES

Appeal from the United States District Court
for the District of South Dakota

The Court has before it the following petitions:

1.) Petition for rehearing en banc filed by appellee in appeal 85-1301.

2.) Petition for rehearing en banc filed by appellee in appeal 85-1301.

3.) Petition for rehearing en banc filed by appellees in appeal 84-2089.

4.) Petition for rehearing en banc filed by appellees in appeal 84-2617.

The petitions in Nos. 84-2553/84-2574, 84-2089 and 84-2617 are granted. The petition for rehearing en banc in 85-1301 was previously granted on March 21, 1986. The Clerk is directed to schedule these appeals for argument on Thursday, May 15, 1986, at St. Paul, Minnesota.

April 8, 1986

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civil No. 81-5048

AGNES LAMONT, GLADYS BISSONETTE, ELLEN MOVES CAMP, EUGENE WHITE HAWK, MARVIN GHOST BEAR, EDGAR BEAR RUNNER, OSCAR BEAR RUNNER, SEVERT YOUNG BEAR, RACHEL WHITE DRESS, HELEN RED FEATHER, EDDIE WHITE DRESS, VICKI LITTLE MOON, MADONNA GILBERT, LORELEI MEANS, and CARLA BLAKEY, PLAINTIFFS

vs.

ALEXANDER HAIG, RICHARD G. KLEINDIENST, JOSEPH T. SNEED, CHARLES D. ABLARD, JOSEPH H. TRIMBACH, RALPH E. ERICKSON, HARLINGTON WOOD, JR., KENNETH BELIEU, ROLLAND GLESZER, EDMUND EDWARDS, JOHN HAY, and VOLNEY F. WARNER, DEFENDANTS

[Filed October 18, 1984]

ORDER

For the reasons as set forth in the Memorandum Opinion of this court filed on this date, it is hereby

ORDERED that the above and foregoing action should be and is DISMISSED, with prejudice and without taxation of costs.

Dated October 18, 1984.

BY THE COURT:

DONALD J. PORTER
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, Clerk

BY: KATHLEEN M. TURBIVILLE
Deputy

(SEAL OF COURT)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40133

OPPOSITION

BRIEF

No. 86-987 (2)

In The

Supreme Court of the United States

October Term, 1986

ALEXANDER HAIG, ET AL.,
Petitioners,

v.

GLADYS BISSONETTE, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID E. ENGDAHL, Counsel of Record for Respondents
31723-A 48th Lane S.W.
Federal Way, WA 98023
(206) 591-2245

KENNETH E. TILSEN
2220 American National Bank Building
Fifth & Minnesota Sts.
St. Paul, MN 55101
(612) 224-7687

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-987

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL., RESPONDENTS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PARTIES ON THIS BRIEF

This Brief in Opposition to a Writ of Certiorari is filed on behalf of all of the Respondents: Gladys Bissonette, Ellen Moves Camp, Eugene White Hawk, Marvin Ghost Bear, Edgar Bear Runner, Oscar Bear Runner, Severt Young Bear, Rachel White Dress, Helen Red Feather, Eddie White Dress, Vicki Little Moon, Madonna Gilbert, Lorelei Means, and Carla Blakey.

REASONS THE PETITION SHOULD BE DENIED

I.

THE PETITION STATES INACCURATELY THE HOLDING BELOW, THE HISTORY AND ISSUES OF THE CASE, THE QUESTIONS PRESENTED, AND EVEN THE PROVISIONS OF LAW INVOLVED

Respondents cannot agree to the Solicitor's Statement of the Case; it contains some highly material misstatements.

Assuredly those misstatements are innocently made. The Solicitor, new to this twelve year old case, and the DOJ Appellate Division Attorneys almost as new to it themselves, cannot have discerned all the misstatements concerning case history contained in the opinions below.

The en banc majority below stressed that "defendants have not yet filed an answer" (Petit., p. 3a); but on the con-

trary, all the answers were noted on the docket sheet which was part of the Record in the Court of Appeals, and in addition the fact of those answers was recited in the briefs. (The judgment being reviewed was, after all, on a Motion for Judgment on the Pleadings!)

If all the lower courts' misstatements of case history were as innocuous as this obvious one, it would not be necessary to labor the point; however, several of them are crucial.

For more than a decade Respondents have endured a contest of attrition which shames the justice system. How much has been required just to reach matters of substance even at this pre-trial stage, is recounted in the Proceedings Addendum at the end of this Brief.

Respondents' original complaint was filed in February, 1975, in the District

of Columbia District. (Although the underlying events had occurred in 1973 the crucial documentation, including Pentagon "after action reports," became available to counsel only by virtue of court order, and only late in 1974.) After a transfer of venue six years later to the South Dakota District, Petitioners renewed on all grounds (except venue) a Motion for Judgment on the Pleadings made in the original forum some months before. The several issues raised by that motion (with others raised by the court sua sponte) were argued both orally and in written memoranda, and decided by Judge Porter's May 1982 Memorandum Opinion, included as Petit. App. D (beginning at p. 39a), published at 539 F.Supp. 552.

Nothing about that 1982 decision is here for review; it is relevant only as background to the question whether Re-

spondents have stated a claim. As such, however, it is indispensable to accurate understanding of Judge Porter's 1984 ruling on the subsequent Motion for Judgment on the Pleadings, reversed by the appellate judgment which is here for review.

It was clear to undersigned counsel from the 1982 ruling that Judge Porter misconceived the case on its merits. The very clauses of that Opinion now recited by the Solicitor on Petit. p. 4 therefore were addressed in a nineteen-page Motion (and Supporting Memorandum) for Clarification or Amendment, filed under Fed. R. Civ. P. 59(e). That Motion was bluntly denied, leaving counsel ~~were~~ to amend the complaint knowing that leave was granted only because Judge Porter wished them to refashion the case, yet convinced that Judge Porter misunderstood the issues and

that following his suggestions thus would ill serve their clients.

Under these circumstances the amended complaint now at issue was prepared. As Judge Porter ordered, it was formally served on all reachable defendants. This time longarm service was governed by more rigorous South Dakota law; still, most Petitioners were successfully served -- this being the third time that actual notification by service had been accomplished. (Sufficiency of service is not now at issue before this Court.)

What is at issue is whether Respondents have stated a claim; and for this it is necessary to heed Respondents' actual allegations -- not the various misconceptions judicially recited, and reiterated in the Solicitor's "Statement." The complaint was amended with elaborate detail in an effort to prevent the exasperation

of more delay by additional objections on colorable "vagueness" grounds -- and also to make unmistakable (it was thought) the theory on which Respondents rely. Yet, the Court of Appeals and Solicitor seem to prefer travelling roads of their own.

The following assertions may seem conclusory, and are not fully documented here; but their aim is to explicate, not to prove, the theory of the claims.

The use of any military in civil situations (even in riots) was contrary to statute and to England's organic charters before this nation was born. (For "insurrection," meaning actual forcible ouster of civil officials and institutions, tantamount to war, a different law applied, permitting military use.) That is why American colonists were incensed when Redcoats were used to disperse mobs.

From the thirteenth and through the eighteenth century this rule was articulated as at the heart of historic "due process;" see MILITARY INTERVENTION IN DEMOCRATIC SOCIETIES (Rowe & Whelan eds., 1985), espec. ch. 9, "Foundations For Military Intervention in the United States." It was discussed during Ratification (including in the Federalist), and was consciously respected in the crafting of legislation by the first Congress -- the same Congress which drafted the Fifth Amendment. Ibid. Repeatedly over the next eighty years courts vindicated this element of "due process" by damage awards -- even where nothing but the fact that military instead of civilian officers had acted could be said to make some deed an actionable wrong. Even Chief Justice Taney applied this "due process" rule.

After Reconstruction zealots had trodden the rule, Congress reinforced it with what inaptly became known as the "Posse Comitatus Act," now 18 U.S.C. sec. 1385. (The Solicitor very materially misquotes this Act at Petit. p. 2.)

Proponents and opponents alike realized that what this Act newly made criminal already was civilly actionable. In fact, when the measure was introduced in the House as an appropriation act rider a point of order was raised, asserting that it was "new legislation" and thus outside the rules for appropriations amendments; but the chair ruled that it

> merely recites what is the existing law ..., and it is therefore but a re-enactment of what the law now is, and the Chair is of the opinion that [it] is clearly within the rules.

7 CONG. REC. 3846 (1878). The debates also evidence a general conviction that "the Act was no more than an expression

of constitutional limitations on the use of the military to enforce civil laws." U.S. v. Walden, 490 F.2d 372, 375 (4th Cir. 1974), citing Cong. Rec.

Although the "Posse Comitatus Act" did not make criminal all of the domestic uses of the military which "due process" forbade, it accomplished dramatic curtailment of military aid to civil law enforcement; and this was particularly felt on the rugged frontiers. See, e.g., 19 Ops. Att'y Gen. 368 (1889) (Alaska Ter.); id. at 293 (1889) (Oklahoma Ter.); 17 Ops. Att'y Gen. 333 (1882) and 242 (1881) (Arizona Ter.); 17 Ops Att'y Gen. 71 (1881) (recovering federal property in Kentucky); see generally 16 Ops. Att'y Gen. 162 (1878). Almost at once, and for almost a century, military aid was limited to situations construed as within some "expressly" authorizing statute (the only

exception allowed by the "Posse Comitatus Act").

So effective was this Act that every domestic use of the military from 1880 to about 1970 (with the exception of a few exceedingly minor exceptions noted in obscure Judge Advocate Generals' files) was carefully premised on one or another express statutory authorization. That some of those statutory authorizations themselves have never been tested for constitutionality (and might fail) does not diminish the extraordinary effectiveness this criminal statute has had.

About 1970, however, certain national officials resolved to depart from this pattern of obedience. This change in executive branch practice is documented in Major Clarence Meeks' article, "Illegal Law Enforcement: Aiding Civil Authori-

ties in Violation of the Posse Comitatus Act," 70 MIL. L. REV. 83, 110-24 (1975).

One thing those officials did was to revamp various C.F.R. provisions (not in issue here), asserting for the first time since Congress rebuffed similar claims of President Grant an executive prerogative (even in subordinate officials) to use the federal military in law enforcement situations without express statutory authority. Those remarkable regulations are still on the books. (It is significant that the adverb "expressly" -- still present in the statute -- is omitted by the Solicitor from his version of that statute, set forth at Petition p. 2.)

Another thing they did -- with no colorable authority either in statute or regulation -- was to employ federal military personnel and materiel at Wounded Knee, to the manifold injury of these Re-

spondents including ten weeks of confinement, the burning of homes, destruction of other property, and volleys of gunfire with consequent deaths.

Respondents maintained from the outset that Petitioners' use of the military against them as they allege was contrary to the ancient prohibition that Taney and others identified with the "due process" clause of the Fifth Amendment. This was not a new theory espoused after ten years as the Eighth Circuit panel once charged, see Petit., p. 31a. Neither was it nineteenth century relic: See Henry Winthrop Ballantine's "Unconstitutional Claims of Military Authority," 24 YALE L. J. 189, 199, 206 (1915), and "Military Dictatorship in California and West Virginia," 1 CALIF. L. REV. 413, 420, 424 (1914).

Judge Porter in his 1982 ruling misconstrued this as a claim for

> the use of a particular governmental activity per se, without ever looking to see what effect that activity actually has on people and property, ... very much like creating a right in a vacuum.

(Petit. at 55a). Respondents, however, did not plead "in a vacuum;" they detailed "what effect that activity actually" had upon them and their property, maintaining that the use of the military in that activity -- being contrary to "due process" -- was enough by itself (whatever additional grounds might exist) to entitle them to relief for their injuries. The complaint was amended in large part to preclude repetition of that "right in a vacuum" misapprehension.

Of course it is noteworthy that Congress made felonious certain domestic uses of the military, including the uses made against these Respondents. But Respondents do not maintain that this criminal statute "gives rise to" a civil

remedy for them, as Petitioners and some lower courts have suggested. Civil redress for injuries resulting from forbidden domestic use of the military had been afforded, in published cases, for more than seventy-five years before the "Posse Comitatus Act" was passed. It is upon that civil remedy tradition -- expressly acknowledged and undisturbed by Congress when it added the criminal penalty -- that Respondents rely.

One of the several injuries of which each Respondent complains is seizure within an armed perimeter for periods as long as seventy-one days. Respondents maintain that using the military to strategize, support, supervise and maintain this seige was sufficient to render the seizure "unreasonable" -- even if (although this is not conceded) without such military use the seige would have

been constitutional. Respondents, however, never have maintained what the Solicitor wrongly describes as "their only claim for relief" (Petit. p. 4): that Petitioners "violated the Fourth Amendment by using the military in contravention of the Posse Comitatus Act ...."

Respondents certainly do maintain that their Fourth Amendment rights were trodden; but they place no "mechanical" or "single-minded reliance" on any statute to illuminate that Amendment. (Contrast Petit. p. 9.) Respondents say the seizure was "unreasonable" because it defied the Anglo-American "due process" rule against domestic military intervention -- one visible, but not indispensable, expression of which is that Act.

The Solicitor characterizes inaccurately the majority holding below; and as a result even the statement of "Questions

Presented" is inapt. The Eighth Circuit did indeed nominally decline to go beyond the Fourth Amendment; but the majority did not hold that "the violation of a federal statute, without more" (no. 1, emph. added), or even "violation of the Posse Comitatus Act ..., without more" (no. 2, emph. added), gives rise to a Fourth Amendment claim. On the contrary the majority expressly found that in this case there is something more:

> [W]e deal with something quite different from a seizure simply unauthorized by statute. We deal with a seizure affirmatively forbidden by a criminal law of long standing, itself expressive of an authentically American tradition of even longer standing.

Petit. at 10a. Whether or not one concedes to this tradition its historic identity as a fundament of "due process," to hold that its violation renders a seizure "unreasonable" carries none of the portent the Petition suggests.

The ruling below is much narrower than that which rightly ought to prevail. It preserves only a minimal residuum of the historic American rule restricting domestic military use. It allows redress for such use only insofar as it is not "expressly" authorized by statute, and even then only insofar as the offensive use entails a "seizure" or a "search."

The en banc majority adhered

> to the decision[] made by the panel, rejecting the Fifth ... Amendment theories pleaded in the complaint,

Petit. at 10a, the panel having reasoned that "plaintiffs do not really need the due-process theory" because

> all of the proof relevant under such a theory will still come in if and when the Fourth Amendment search-and-seizure theory goes to trial.

Petit. at 32a. By this tragic myopia, all of the several claims independent of seizure erroneously were cut off.

Nonetheless, though the ruling below be inexcusably narrow, under it Respondents can prove their case on the merits; and after twelve years, they should not be required to suffer postponement of their opportunity for trial any longer.

The broader legal theory which ought to have prevailed has great implications for other domestic uses of the military, including controversial uses which lately have been proposed; and if this Court grants review in this case, those implications surely must be addressed. No contemporary issue has deeper roots in our legal history, and on few could a wrong holding -- like the Stuarts' Ship-Money Case, 3 State Trials 825 (1637) (erroneously upholding royal military prerogative, thus hastening the English Revolution) -- be more portentious. But these Respondents are not pawns in some

statecraft game; they have been denied their redress too long, and should be put off no longer.

The Solicitor, it seems from Petit. p. 8 and n. 5, would have this Court endorse the "qualified immunity" notion never ventured until oral argument on rehearing and yet endorsed by the minority below. Whatever the disagreements among Justices of this Court on official immunity, however, none has gone so far as the dissenters below. To do so would require astonishing disregard of a basic premise of judicial practice, essential to fairness and justice.

The District Court granted a Motion for Judgment on the Pleadings without considering anything outside the pleadings; and the sole ground of dismissal was the purported failure to state a claim. It is elementary that under such

circumstances the material allegations of a well-pleaded complaint must be treated as true, and every denial or contrary assertion by or on behalf of the moving party as false. Yet the dissenters below followed -- as if beyond controversy -- their own preconceptions regarding the material events.

Beyond detailing Petitioners' acts and the injuries Respondents attribute thereto, the complaint in this case (part of the Record below) elaborately alleged facts showing Petitioners' acts to have been unnecessary, unreasonable, unjustified, illegal, and (on the parts at least of several Respondents) performed knowingly in violation of law and not for any public safety reason. Indeed, paragraph 36 of the complaint alleged that politics motivated the seizure, literally <u>quoting</u> the language underlined below which is

excerpted from a report prepared at the instance of some Petitioners themselves five days after the start of their seige. The report (from the Pentagon's Directorate of Military Support) explained that the so-called "occupation" of Wounded Knee by some native American activists

> poses no threat to the Nation, the State of South Dakota, or the Pine Ridge Reservation itself. However, it is conceded that this act is a source of irritation if not embarrassment to the Administration in general and the Department of Justice in particular.

Complaint paragraphs 39 and 43 further alleged disingenuous congressional testimony by some of the Petitioners, designed to conceal the nature and scope of what actually had been done.

In the teeth of these allegations -- controverted but untried -- and without colorable basis for contrary judicial notice, the Eighth Circuit dissenters urged judgment for Petitioners on the pleadings

for the reason that all their actions were "reasonable and responsible;" "in all respects honorable and blameless;" the acts of a "liberator" taken "in the face of an armed uprising ... to ... restore civilian rule ...;" and actions which were "restrained and objectively reasonable," "the entire purpose behind [which] was to ensure and restore domestic tranquility ..."! The only reference to loss or saving of lives in the complaint or in any answer was to the death of Buddy Lamont; yet those dissenters urged consideration "of the lives saved ...." (The dissent below is reproduced at pp. 11a-14a of the Petition.)

Those dissenters, on these pleadings, would grant "qualified immunity" for all of the acts of all the Petitioners, declaring: "No further factual development is needed in this case to

resolve this issue." How much more efficient would be the administration of justice if all of our judges possessed such omniscience, such intimate knowledge of all material facts, contrary to good pleadings and without need of trial!

II.

THE HOLDING DOES NOT CONFLICT WITH ANY FOURTH AMENDMENT CASE

True enough, "reasonableness" for purposes of the Fourth Amendment involves judgment on the particular facts and circumstances; and the fact that a given search is not expressly authorized by applicable law does not preclude its being judged "reasonable." Cooper v. California, 386 U.S. 58, 61 (1967). But the Cooper rule is irrelevant here: As the majority below said, in the present case

> we deal with something quite different from a seizure simply unauthorized by statute.

Petit. at 10a.

In no case has any court ever found "reasonable" a search or a seizure accomplished by felony, or by means which were unconstitutional on independent grounds or even simply offensive to dearly valued tradition. Those are the facts of this case; as the majority below continued:

> We deal with a seizure affirmatively forbidden by a criminal law of long standing, itself expressive of an authentically American tradition of even longer standing.

Petit. at 10a.

The Solicitor's charges of "mechanical reliance on a statutory violation" (Petit. at 9), "single-minded reliance on statutes for the meaning and content of the Fourth Amendment" (Petit. at 9), "truncated analysis" (Petit. at 11), and "statutory short-cut" (Petit. at 13), al-

though colorful, are neither accurate nor fair.

The dissenters below did accuse the majority of avoiding

> examination of the circumstances or exigencies giving rise to the actions taken or the scope, nature, or purpose for which the actions were taken.

Petit. at 11a-12a. As already noted, however, those dissenters' view of the circumstances amounted to recollections of a scenario conjured by old news media accounts, all at odds with the documentary records of Petitioners themselves that form the basis of Respondents' claims.

III.

THE SOLICITOR REPRESENTS INACCURATELY THE "POSSE COMITATUS ACT" AND THE PRACTICE AND PRECEDENTS UNDER IT

Other inaccuracies and misstatements in the Petition might be excused as inadvertent, or perhaps as within the bounds of fair advocacy; but in its treatment of the "Posse Comitatus Act" the Petition falls below the standard of candor to be expected of the Solicitor's Office.

The Solicitor describes this statute as one "that simply regulates the deployment of certain military personnel," Petit. at 9-10, the "importance and meaning" of which "were not entirely apparent" when it was enacted, id. at 14, and which was adopted only as a partisan concession to ensure passage of an appropriations bill, ibid. It is described as "obscure and all-but-forgotten," id. at 14, "open to ready modification," and "measurably narrowed in 1981," ibid. Pretending its "infinite malleability," id. at 15 n. 6, the Solicitor describes the Act as "riddled ... with exceptions

and susceptible ... to ... suspension by the President," id. at 15.

None of this is true.

If the "Posse Comitatus Act" seemed to the First Circuit in 1948 like an "obscure and all-but-forgotten statute," Chandler v. U.S., 171 F.2d 921, 936, cert. denied, 336 U.S. 918 (1949), that "was probably due to the fact that, in broad terms, it had accomplished its mission." Col. Paul Jackson Rice, "New Laws and Insights Encircle the Posse Comitatus Act," 104 MILIT. L. REV. 109, 111 (1984). The effectiveness of a criminal statute is not shown by how often violations of it make prosecutions necessary. This one produced immediate change in practices, and was obeyed for some ninety years:

> After the passage of the Act, it was understood that federal troops were not available to supplement civilian law enforcement officials. Hence, the issue seldom arose.

Rice, ibid. Both Major Meeks and Colonel Rice in their respective articles, supra, observe that this pattern of obedience was substantially unbroken until the early 1970's -- and that the Wounded Knee incident was a harbinger of the change.

The "Posse Comitatus Act" might be as flaccid as the Solicitor pretends if it really were written as the Solicitor misquotes it on Petit. p. 2. But the adverb "expressly" -- omitted from the Solicitor's version -- is what gives to the statute its critical force.

The Senate deleted that word from the House bill shortly after enlarging the exception to include military uses authorized "by the Constitution;" see 7 CONG. REC. 4240, 4246-48, 4302 (1878). The principal objective of the measure's proponents, however, was to negate all

possible assertions (such as President Grant had made in 1877, 7 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 418-421 (publ. 1898)) that some extrastatutory executive prerogative to make domestic law enforcement use of the military can be inferred from the Constitution.

Reference to purported constitutional authorization would be harmless if the adverb "expressly" were restored; for the Constitution contains no "express" authorization for any such military use. *

* The only constitutional provision dealing "expressly" with any domestic use of the military is Art. I, sec. 8, cl. 15; and that confers power only upon Congress.

Art. II, sec. 3 requires the President to "take Care that the Laws be faithfully executed," but does not even remotely suggest that he may use the military to do so. (In fact, the "Posse Comitatus Act" is one of the laws that he must faithfully execute.)

Art. II, sec. 2 makes him "Commander in Chief of the Army and Navy," but does not say he may use these military forces for domestic law enforcement. Moreover, since Congress by Art. I, sec. 8, cl. 18 may determine how even this "Commander-in-Chief" power should be carried into execution, the "Commander" clause can hardly be regarded as "express" constitutional authority for law enforcement use of the military contrary to Congress' will.

The "Guaranty Clause," Art. IV, sec. 4, puts the duty to protect "against domestic Violence" not upon the executive, but upon "the United States;" and Art. I, sec. 8, cl. 18 gives not to the President, but to the Congress, power to provide for fulfilling this duty. Moreover, with reference to "domestic Violence" (even assuming the phrase contemplates more than such true "insurrections" as the then recent Shay's Rebellion, see THE FEDERALIST Nos. 25, 26, 43) the "Guaranty Clause" gives no "express" authority to use any military means.

(For "insurrection," yes; but as Hamilton and Madison both show in THE FEDERALIST, no's 8, 25, 26, 27, 29, & 43, "insurrection" was then understood here as in England to mean outright rebellion, actual forcible ouster of civil officials and institutions.) As the House Judiciary Committee observed only six years ago,

> The [Posse Comitatus] Act permits Constitutional exceptions. However, there are none.

H.Rep. 91-71, Part II, at 6 n. 3, 1981

U.S. CODE CONG. & ADMIN. NEWS at 1789. Specifically to foreclose arguments of constitutional "implication," as much as (if not more than) inferences from tradition and extrapolations from ambiguous statutes, the House conferees in 1878 insisted (successfully) that the word "expressly" be restored. See 7 CONG. REC. 4686 (1878).

The Solicitor's misstatement of the text of this statute is aggravated by his misstatements concerning its meaning and impact.

There were, to be sure, certain times during Congress' debate of this measure when "its importance and meaning were not entirely apparent," Petit. at 13. But that was only because years of turmoil and dispute -- from Buchanan's misguided excuse for inaction in 1860 to Grant's extravagant claims of 1877 -- had

beclouded the law with confusion. In particular, the older rule allowing soldiers to be used <u>as civilians</u> (though in uniform and in their regular units) -- the traditional "posse" practice attested by 6 Ops. Att'y Gen. 466 (1854) -- seemed to many in 1878 incomprehensibly strange. All of this uncertainty as to "importance and meaning" evidenced for example by the remarks of Senators Kirkwood and Howe cited at Petit. p. 13, however, was resolved by the language ultimately approved, which prohibits use "as a posse comitatus, or otherwise, for the purpose of executing the laws ...."

As to the passage the Solicitor quotes from Senator Edmunds, 7 CONG. REC. at 4241-42, that does not illustrate uncertainty at all. It rather was an opponent's rhetorical exploitation of precisely the dilemmas the measure would re-

solve. The presidential prerogative he urged as inferrable the Act was beyond doubt designed to foreclose; and Army aid to federal marshals (his other rhetorical "uncertainty") was just as plainly to be forbidden -- as shown by the series of Attorney Generals' opinions commencing immediately after the Act took effect.

Nor is there truth in the Solicitor's suggestion (Petit. at 14) that the Act was merely a partisan concession for Democratic House votes on the appropriations bill to which it was a rider. Senator Conkling, one of those the Solicitor cites for this ploy, at the cited page actually spoke to the contrary, urging that the rider be stricken even though, "on an appropriate bill, at the proper time," he would support it on its merits. 7 CONG. REC. 4303. Senator Bayard, the other to whom the Solicitor attributes

this ploy, at both cited pages actually urged Senate acceptance of the rider on its merits, calling it "a proposition containing a wholesome constitutional truth" (id. at 4296), and "very little more than a truism which I am not prepared to hear denied" (id. at 4301).

The Solicitor is of course wrong in suggesting, Petit. at 15, that the "Posse Comitatus Act" is susceptible to "suspension by the President." The President under our Constitution cannot "suspend" any law, even in those dire circumstances when suspension of the Great Writ is allowed. What the President may do -- but only because Congress authorized it -- is invoke 10 U.S.C. sec. 331, 332, or 333, when appropriate, by issuing a Proclamation satisfying sec. 334. This "proclamation" is no mere formality: It obliges deliberate determination, is a highly

public process, involves the President personally, and makes him politically accountable.

The Act is not "riddled ... with exceptions." Apart from 10 U.S.C. secs. 331-333 and the 1981 provisions now codified at 10 U.S.C. secs. 371 et seq., the "cases" in and "circumstances" under which law enforcement use of the military is "expressly authorized by ... Act of Congress" are very few, and extremely specialized and unique.

Until the 1970's, even the loaning of military equipment wholly without personnel was deemed at least dubious under the "Posse Comitatus Act;" only a few instances occurred, involving simple and innocuous equipment like a mine detector used to find a discarded gun. And it was understood as an unexceptionable rule that military equipment never could be

loaned for civil law enforcement accompanied by any military personnel. Major H.W.C. Furman, "Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act," 7 MILIT. L. REV. 85, 123-24 (1960). Major Furman observed that JAG Opinions consistently had reiterated this as the import of the Act; thus the point was beyond doubt long before the search use of an Air Force helicopter and crew was held to violate the Act in Wrynn v. U.S., 200 F.Supp. 457 (E.D.N.Y. 1961).

Therefore the very reason the Fourth Circuit in 1974 could find the police use of Marines unprecedented, U.S. v. Walden, 490 F.2d 372, at 377, is that until the early 1970's (when this case also arose) no one had shown the audacity to so flout the very well known strictures of the "Posse Comitatus Act!"

Absolutely no antedating authority of any kind can be found to give color of legality to the massive enlistment of regular Army and Air Force personnel and materiel -- more than 175 rifles and about 190,000 rounds of ammunition; vehicles; aircraft with active federal duty crews; communications facilities and operators; flares, grenades and launchers; rations and supplies; on-site command and logistics personnel; off-site planning and strategy personnel; pre-positioned armed forces on ready alert; and more -- on the occasion of Wounded Knee. Only in the wake of this radical departure from prior practice have some judges ventured differing theories to excuse various measures of military use. Never until after the event from which this case arose was there any confusion approaching this nightmare of incongruity

among vying interpretations of the Act, which the Solicitor now would escape by pretending that a statute understood and obeyed faithfully for nine decades always was hopelessly vague.

Judges Bogue, Nichol, Urbom, and VanSickle announced different interpretations of the "Posse Comitatus Act" in separate criminal proceedings following Wounded Knee. (None of these Respondents was involved.) The Eighth Circuit in U.S. v. Casper, 541 F.2d 1275 (1976), cert. denied, 430 U.S. 970 (1977), without pronouncing one or another interpretation correct, affirmed the specific holding in VanSickle's case, which Van Sickle himself had declared he would reach whether using Judge Urbom's interpretation or his own.

To this newly made quagmire of jurisprudence, other Circuit and District

Courts have been forced to contribute as increasing law enforcement use of the military during the past fifteen years has brought burgeoning "Posse Comitatus Act" litigation in its train.

The Solicitor asserts that the potential reach of the "Posse Comitatus Act" was "measurable narrowed" in 1981; but that distorts the truth. Two sections of Pub. L. 97-86, sec. 905, 95 Stat. 1114-1116 -- the sections now codified as 10 U.S.C. secs. 372 and 373 -- do authorize loans of military equipment as well as assignment of personnel to train civilian law enforcement personnel in its operation and maintenance and give some advice. Although arguably as to equipment and certainly as to personnel this would have violated the "Posse Comitatus Act" as followed prior to 1970, by 1981 obedience was so rare that administration

witnesses could tell Congress that these sections did no more than "codify existing practice." But of the 1981 changes these are the least significant.

The most significant part of this 1981 law is that codified now as 10 U.S.C. sec. 374. This section for the first time authorizes certain specified uses of the military which no one pretends would have been legal before. The specified uses include transportation, logistics, and the monitoring (surveillance) of air and sea traffic -- but only to enforce designated drug, immigration, and customs laws.

As approved in House Committee, this provision would have permitted such "passive" uses of the military <u>even domestically</u>; but Committee members disturbed at so great a departure from what the "Posse Comitatus Act" otherwise would forbid put

a restricting floor amendment (See Views of Seiberling and Edwards, H.Rep. 97-71, Part II, at 16-18, 1981 U.S. CODE CONG. & ADMIN. NEWS at 1797-99), which the whole Congress adopted (see CONG. REC. Daily Digest 4476-4478, July 16, 1981). Thus sec. 374 as enacted restricts these newly permitted law enforcement uses of the military not only to those few designated statutes but also to places "outside the land area of the United States."

The 1981 statute is most significant, in other words, as a vigorous reaffirmation of the "Posse Comitatus Act" as it applies to domestic use, at least as to personnel. The uses which Congress in 1981 specifically refused to permit, even for goals so important as enforcing drug, customs, and immigration laws, included transportation, logistics, and surveillance -- three categories of use of the

Army and Air Force specifically alleged ~~in~~ to have been made in support of the seizure of Respondents at Wounded Knee!

It is signficant that all three of these categories as to which Congress elected to keep the "Posse Comitatus Act" prohibition intact are "passive" in character; none is "regulatory, proscriptive, or compulsory in nature." This distinction has been a favorite of lawyers and judges over the past fifteen years trying to compromise the stark prohibition of the Act.

The Committee Report on the 1981 statute recites all but approves none of the recent cases through 1981 tendering various such formulas of compromise. Proceding, with this knowledge, to confirm the prohibition of even such passive law enforcement uses within the nation's land area, Congress manifestly has renounced

all the narrowing constructions of the "Posse Comitatus Act" discussed by the Eighth Circuit in the Casper case, supra -- which the majority in this case nonetheless reaffirmed, see Petit. at 10a.

Notwithstanding the confusion surrounding the "Posse Comitatus Act" as a result of endeavors since 1970 to make it mean something less than it says, there are some principles which have remained clear; and among them is the proposition that a search or a seizure accomplished by means felonious under this statute is -- whether for that reason alone or for the more fundamental reasons which explain Congress' continued insistence that this statute remain -- "unreasonable" for purposes of the Fourth Amendment. The Solicitor's contrary representations concerning the relevant caselaw are simply inaccurate.

At least twice in the past seven years, courts not only have found searches or seizures in violation of this Act "unreasonable" for Fourth Amendment purposes, but in consequence actually have applied the exclusionary rule. An Oklahoma appeals court ordered exclusion of evidence secured through violation of the "Posse Comitatus Act" in Taylor v. State, 645 P.2d 522 (Okl. Cr. App. 1982); and the Michigan Court of Appeals did likewise in People v. Burden, 94 Mich. App. 209, 288 N.W.2d 392 (1980). (The Michigan Supreme Court reversed the Burden holding, but solely on the ground that the Airman's assistance "was of a personal nature, unrelated to his status as a military man," so that his use could not be deemed contrary to the Act. 411 Mich. 56, 303 N.W.2d 444, at 447 (1981).)

Those were state cases; but no federal case intimates a contrary view. It simply is not true (as the Solicitor at the bottom of Petit. p. 9 asserts) that other Circuits have rejected claims analogous to that upheld by the majority in this case below. In particular, none of the five cases given as examples on pages 15-16 of the Solicitor's Petition did so even remotely.

In two of those cases the actions of the military personnel involved were expressly authorized by law: in Eugene Hartley's case by the 1981 legislation discussed above, see U.S. v. Hartley, 796 F.2d 112 (5th Cir. 1986); and in Cecil Hartley's case as the prescribed routine duty of inspecting food to be served to military personnel, see U.S. v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982), certs. denied, 459 U.S. 1170 & 1183

(1983); see also id. at the District Court, 486 F.Supp. 1348, 1356-57 (M.D. Fla., 1980). In the face of such express authorization, no violation of the Act could be found.

In two of the others, the personnel used were outside the scope of the Act itself; their use only violated naval regulations, similarly restricting use of Navy and Marine personnel but not even purporting to make such use a crime. See U.S. v. Roberts, 779 F.2d 565 (9th Cir. 1986); U.S. v. Walden, 490 F.2d 372 (4th Cir. 1974), cert. denied, 416 U.S. 983 (1974). Moreover the Walden Court specifically noted the innocence (490 F.2d at 376) and singularity (id. at 377) of the violation; and the Roberts Court emphasized that the violation was "unintentional and in good faith" (779 F.2d at 568). These cases certainly give no

intimation that a knowing and willful felonious use of the military to maintain a seizure (as in the case at bar) might be considered "reasonable" for purposes of the Fourth Amendment.

The Solicitor asserts at Petit. p. 15 that Walden "explicitly rejected the broad premises applied by the court of appeals in this case." On the contrary, however, the excellent opinion in Walden actually confirms those premises.

Only one of the five cases cited at Petit. pp. 15-16 actually involved an alleged willful use of some part of the Army or Air Force to execute the laws in a manner not "expressly authorized" by Congress; and even in that case the Court of Appeals specifically declined to decide whether the "Posse Comitatus Act" had been violated. U.S. v. Wolffs, 594 F.2d 77, 84-85 (5th Cir. 1979).

The refusal to apply the exclusionary rule in Wolffs -- and in Walden, 490 U.S. at 373, and Roberts, 779 F.2d at 568 (where violations of the comparable Navy regulations were found)-- is no indication that violations of the Fourth Amendment were not found. All three courts regarded the exclusionary rule as no more than a judicially devised tool for enforcing the Fourth Amendment (see U.S. v. Callandra, 414 U.S. 338, 347-48 (1974)), by no means the measure of that Amendment itself. Thus, each declared that it would consider exclusion in the future should continuing violations make a need for deterrence appear. Roberts, 779 F.2d at 568; Wolffs, 594 F.2d at 85; Walden, 490 F.2d at 377.

Thus these federal cases actually destroy the proposition the Solicitor cites them to support; for if such civil

law enforcement use of the military had not been deemed sufficient in itself to render the attendant searches or seizures "unreasonable" for purposes of the Fourth Amendment it would have been unnecessary even to consider whether to apply the exclusionary rule!

Here there is no exclusionary rule question; what is sought is civil relief. And "unreasonable" seizure by a federal officer certainly states a claim. Bivens v. Six Agents, 403 U.S. 388 (1971).

The Solicitor's reliance on Michigan v. Tyler, 436 U.S. 499, 506 (1978), Petit. at 16-17, is frighteningly inapt. Certainly it makes no constitutional difference that "the official conducting the search wears the uniform of a firefighter rather than a policeman ...;" but firemen and policemen alike are civilian officials.

The Solicitor would distort Tyler to abolish the unique prohibition against military involvement in civilian police affairs. He thus would have this Court abandon far too much of our law and our history. He asks, in sum, that we:

-- forget this Court's reminder that "the decision to invoke military power has traditionally been viewed with suspicion and skepticism ...," Scheuer v. Rhodes, 416 U.S. 232, 246 (1974);

-- forget what the Fourth Circuit described as the policy, with "deep roots in American history," "that military involvement should be carefully restricted," Walden, supra, 490 F.2d at 375; and

-- forget what this Court has called the "traditional and strong resistance of Americans to any military

intrusion into civilian affairs,"
Laird v. Tatum, 408 U.S. 1, 15
(1972).

Surely we dare not do as the Solicitor asks.

Conclusion

If certiorari is granted, it cannot be on the questions the Solicitor asserts are presented; because those are not the questions actually posed by this case and by the proceedings and decision below. Review instead surely would have to reach the momentous broad question of military involvement in civil law enforcement in a modern democratic state claiming title to leadership within the free world. It would be necessary to compare with our fondest pretenses the reality of practice we have allowed to take hold and become almost common in the past fifteen years.

But these Respondents should not be required to abide such ~~such~~ sober reflections. Their victory below, while narrower than it should be, allows them at last a modicum of redress for wrongs which they suffered fourteen years ago. The arguments to deny them even this narrow opportunity are wholly unsound. The Petition for Certiorari should be denied.

Respectfully submitted,

DAVID E. ENGDAHL, Counsel of Record for Respondents

31723-A 48th Lane S.W.
Federal Way, WA 98023
(206) 591-2245

KENNETH E. TILSEN
2220 American National Bank Building
Fifth & Minnesota Sts.
St. Paul MN 55101
(612) 224-7687

January, 1987

PROCEEDINGS ADDENDUM

Twelve years have elapsed since this case was filed, but still it has progressed no further than to a judgment on the pleadings. Responsible lawyering demands that some explanation be made.

The case originally was filed in the District of Columbia District because it seemed a convenient forum (most defendants then were still in that region) and because that venue seemed proper both as the command center of the operation giving rise to the claims and because of 28 U.S.C. sec. 1391(e) (then not yet given the restricted scope it now has). Service of process on all defendants was attempted, in some instances using the D.C. longarm law. (Service sufficiency questions remain as to some parties, but none are material at the present stage.)

The complaint was dismissed solely on venue grounds on July 31, 1975, and a timely appeal was taken. Briefing was completed in January, 1976; but even on the "summary docket" it was nine months before argument. Two more years after argument, the Court of Appeals for the District of Columbia Circuit decided the case. On October 16, 1978, it held that sec. 1391(e) sustained venue as to some of the defendants; and with respect to 28 U.S.C. sec. 1391(b) it ordered leave "to amend the complaint to specify more clearly which of the asserted activities transpired here [in D.C.] and which appellees are thought to have had a hand therein." Lamont v. Haig, 590 F.2d 1124, 1136 (D.C. Cir. 1978).

Plaintiffs promptly filed an amended complaint tailored to resolve every sec. 1391(b) doubt, and formally served all

reachable defendants again. However, the defendants (who still had not answered) then moved for an indefinite stay of proceedings, which that District Court over plaintiffs' objections granted. The stay was in force until April, 1980, eighteen months after the plaintiffs had won their venue appeal.

Further extensions for answers, once the stay had been lifted, then were given, so that answers at last were filed only in June and July, 1980. Five years and five months had therefore elapsed before the pleadings first were closed.

Still that was only the initial delay. On motion of the defendants, and again without reaching any issue but venue, the case was transferred to the South Dakota District on February 26, 1981. Judge Pratt's explanatory memorandum spoke in terms appropriate to 28 U.S.C.

sec. 1404(a); but his order recited sec. 1406(a): wrong venue.

That unappealable order, six years after the case had commenced, introduced new questions on personal jurisdiction, service sufficiency, and even periods of limitation -- as to all of which D.C. law had been relied upon.

In his own rulings on those several issues (rulings which are not now here for review) Judge Porter of the transferee South Dakota District has taken as his premise the opposite view, that venue in the District of Columbia was proper in the first place under sec. 1391(b), (although of course it is proper in South Dakota, too). In other words, in addition to the more than five years delay before the first answers due to the erroneous venue dismissal and, after reversal, a stay, more delay and untoward com-

plication of procedural questions must be charged to the second wrong (but this one unappealable) ruling on venue. The plaintiffs (Respondents here) are responsible for none of this delay.

"Justice delayed is justice denied;" and this certainly is true for the one plaintiff and two defendants who died while these procedural games were being played.

* * * * * * *

JOINT

APPENDIX

No. 86-987

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

DAVID ENGDAHL
31723-A 48th Lane, S.W.
Federal Way, Washington 98023
(206) 756-3485

KENNETH E. TILSEN
2220 American National Bank Building
Fifth & Minnesota Streets
St. Paul, Minnesota 55101
(612) 224-7687

Counsel for Respondents

CHARLES FRIED
Solicitor General
Washington, D.C. 20530
(202) 633-2217

Counsel for Petitioners

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 15, 1986
CERTIORARI GRANTED FEBRUARY 23, 1987

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Case No. Civ. 75-0271

February 27, 1975	Complant Filed
February 23, 1979	Amended Complaint Filed
March 3, 1981	Order Transferring Case To The District of South Dakota

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

Case No. Civ. 81-5048

May 24, 1982	Order Dismissing Complaint But Granting Respondents Leave To File Amended Complaint
July 20, 1982	Second Amended Complaint Filed
October 18, 1984	Order Dismissing Action With Prejudice

IN THE UNITED STATES COURT OF APPEALS

Case No. 84-2617

December 12, 1984	Notice of Appeal Filed
November 12, 1985	Judgment Of Court Of Appeals Reversing Judgment Of District Court And Remanding

DATE	PROCEEDINGS
January 27, 1986	Petition For Rehearing And Suggestion For Rehearing En Banc Filed
September 16, 1986	Judgment Of Court Of Appeals En Banc Reversing Judgment of District Court And Remanding

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH DAKOTA

Civil Action No. 81-5048

AGNES LAMONT, GLADYS BISSONETTE, ELLEN MOVES CAMP, EUGENE WHITE HAWK, MARVIN GHOST BEAR, EDGAR BEAR RUNNER, OSCAR BEAR RUNNER, SEVERT YOUNG BEAR, RACHEL WHITE DRESS, HELEN RED FEATHER, EDDIE WHITE DRESS, VICKI LITTLE MOON, MADONNA GILBERT, LORELEI MEANS, AND CARLA BLAKEY, PLAINTIFFS,

v.

ALEXANDER HAIG, WAYNE COLBURN, RICHARD G. KLEINDIENST, JOSEPH T. SNEED, CHARLES D. ABLARD, JOSEPH H. TRIMBACH, RALPH E. ERICKSON, HARLINGTON WOOD, JR., KENNETH BELIEU, ROLLAND GLESZER, EDMUND EDWARDS, JOHN HAY, AND VOLNEY F. WARNER, DEFENDANTS.

SECOND AMENDED COMPLAINT FOR DAMAGES AND OTHER RELIEF

JURISDICTION

1. This is an action for damages arising out of injuries caused to each Plaintiff by acts of the Defendants done by them in, or under color of, their respective roles as federal government officers and contrary to the constitutional rights of Plaintiffs under the First, Fourth, Fifth, and Eighth Amendments and other provisions of the United States Constitution, as set forth more fully below.

2. This Court has jurisdiction of the subject matter of this Second Amended Complaint under Title 28 U.S.C. section 1331. Although no longer material, the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

PARTIES

3. Plaintiffs Agnes Lamont, Gladys Bissonette, Ellen Moves Camp, Eugene White Hawk, Marvin Ghost Bear, Edgar Bear Runner, Oscar Bear Runner, Severt Young Bear, Rachel White Dress, Helen Red Feather, Eddie White Dress, Vicki Little Moon, Madonna Gilbert, Lorelei Means, and Carla Blakey are Native Americans and are citizens of the United States. All except Gilbert, Means, and Blakey were residents of the Pine Ridge Indian Reservation in South Dakota at all times material to these claims; and Rachel White Dress, Eddie White Dress, Helen Red Feather, and Vicki Little Moon were residents of the village of Wounded Knee on that Reservation at all material times.

4. Defendant Alexander Haig during the material time was Lieutenant General and Vice Chief of Staff of the United States Army.

5. Defendant Wayne Colburn during the material time was Director of the United States Marshal's Service.

6. Defendant Richard G. Kleindienst during the material time was Attorney General of the United States.

7. Defendant Joseph T. Sneed during the material time was Deputy Attorney General of the United States.

8. Defendant Charles D. Ablard during the material time was Associate Deputy Attorney General of the United States.

9. Defendant Joseph H. Trimbach during the material time was Federal Bureau of Investigation (FBI) Special Agent in Charge in and around the Village of Wounded Knee.

10. Defendant Ralph E. Erickson during the material time was a Special Assistant to the Attorney General of the United States.

11. Defendant Harlington Wood, Jr., during the material time was Assistant Attorney General of the United States in charge of the Civil Division of the Department of Justice.

12. Defendant Kenneth Belieu during the material time was Undersecretary of the United States Army.

13. Defendant Rolland Gleszer during the material time was a Major General in the United States Army or Air Force, and until March 30, 1973, was Commander of the Directorate of Military Support.

14. Defendant Edmund Edwards during the material time was a Brigadier General in the United States Army or Air Force, and was Deputy Commander of the Directorate of Military Support until March 30, 1973, at which time he became its acting Commander.

15. Defendant John Hay during the material time was a Lieutenant General and the Commander of the Eighteenth Airborne Corps, United States Army.

16. Defendant Volney F. Warner during the material time was a Colonel and the Chief of Staff of the 82nd Airborne Division, United States Army. After the events giving rise to the claims of these Plaintiffs, he was promoted to Brigadier General and made the Assistant Division Commander of the 82nd Airborne.

FIRST SET OF CLAIMS: SEIZURE, CONFINEMENT, AND DEPRIVATIONS OF LIBERTY AND OTHER RIGHTS

17. (a) Beginning on February 27, 1973, the several Defendants maintained or caused to be maintained roadblocks and armed patrols constituting an armed perimeter around the village of Wounded Knee on the Pine Ridge Indian Reservation in South Dakota.

(b) The material acts by which each respective Defendant participated in maintaining or causing to be maintained this armed perimeter are specified in paragraphs 41 through 55, which are incorporated by reference herein.

(c) The armed perimeter was maintained or caused to be maintained by the Defendants under color of executing the laws.

(d) The armed perimeter was maintained or caused to be maintained by the Defendants for approximately ten weeks, substantially without interruption.

(e) While the armed perimeter was maintained, ingress of persons into and egress of persons from Wounded Knee was prohibited, inhibited, and prevented by armed force and show of armed force by Defendants and their deputies and agents acting pursuant to Defendants' authority and instructions, except when and insofar as Defendants or their deputies and agents elected to allow.

18. By the actions of Defendants alleged in paragraph 17, the following Plaintiffs were seized, confined, and made prisoners against their will within the armed perimeter for all or substantially all of the ten weeks following February 27, 1973: Gladys Bissonette, Ellen Moves Camp, Agnes Lamont, Eugene White Hawk, Marvin Ghost Bear, Edgar Bear Runner, Severt Young Bear, Oscar Bear Runner, Madonna Gilbert, Lorelei Means, and Carla Blakey.

19. The following Plaintiffs at the material time were residents of Wounded Knee and maintained their homes there. By the acts of Defendants alleged in paragraph 17 each of these Plaintiffs was for a substantial period of time seized, confined, and made a prisoner against his or her will within the armed perimeter, and thereafter for the remainder of the ten weeks following February 27, 1973, was prevented against his or her will from returning to his or her home in Wounded Knee: Rachel White Dress, Eddie White Dress, Helen Red Feather, and Vicki Little Moon.

20. Each of the Plaintiffs, during the period while each respectively was confined against his or her will within the armed perimeter, suffered each of the following injuries as a result of the actions of Defendants alleged in paragraph 17:

(a) being seized and made a prisoner, by virtue of being prevented by armed force and by show of armed force from leaving Wounded Knee at will;

(b) being deprived of the liberty of movement and travel, by virtue of being prevented by armed force and show of armed force from leaving Wounded Knee at will;

(c) being deprived of the liberties or rights of assembly, association, and religious exercise, by virtue of being prevented by armed force and by show of armed force from leaving Wounded Knee at will to assemble, associate, and exercise their religion at other places or with other persons than at Wounded Knee;

(d) being deprived of essential requisites of life, including needed food and medicine and medical care, by virtue of being prevented by armed force and by show of armed force from leaving Wounded Knee to procure such requisites, while suppliers of such requisites were by the same force and show of force prevented from entering Wounded Knee; and

(e) being deprived of property and the liberty to pursue lawful employment and other benefits, by virtue of being prevented by armed force and show of armed force from leaving Wounded Knee to appear elsewhere for work or for application for work or benefits, as was requisite for them to do.

21. In addition to the injuries described in paragraph 20, Plaintiffs Rachel White Dress, Eddie White Dress, Helen Red Feather, and Vicki Little Moon each suffered the following additional injuries as a result of the actions

of Defendants alleged in paragraph 17 during the period when each was prevented against his or her will, by the armed force and show of armed force constituting the armed perimeter, from entering Wounded Knee: Each was prevented from protecting and preserving his or her home, and belongings therein, from being destroyed by fires caused by Defendants and their deputies or agents.

22. The actions of Defendants alleged in paragraph 17 were unlawful—and thus the seizure, confinement, and imprisonment of each Plaintiff was unreasonable contrary to the Fourth Amendment to the Constitution, and the deprivations of Plaintiffs' respective liberties of movement and travel and other liberties or rights were without due process of law and otherwise unconstitutional contrary to the Fifth, Eighth, and First Amendments and other provisions of the Constitution—for the reason that Defendants accomplished or caused to be accomplished those actions by means of the unconstitutional and felonious use of parts of the United States Army or Air Force, without any legal authority and contrary to Title 18 U.S.C. section 1385 and other provisions of law. Specifically, Defendants used or caused to be used the United States Army or Air Force as follows to maintain the armed perimeter:

(a) Active Army and Air Force personnel, including Defendants Warner, Haig, Gleszer, Edwards, and Hay, and LTC Sapp (first name unknown) were used as principal participants in designing, adapting, supervising, approving, and implementing strategy and tactics to maintain the armed perimeter, and otherwise under color of executing the laws at Wounded Knee.

(b) Active Army and Air Force personnel, including Col. Jack C. Potter, Col. William Williamson, LTC Harold Ankeman, Col. Joseph Baker, and LTC R. F. Ventrella, were used to coordinate logistics, communications, intelligence, and military

equipment and supply, all to facilitate and make possible the maintenance of the armed perimeter and other measures under color of executing the laws at Wounded Knee.

(c) Army or Air Force armored vehicles, jeeps, searchlights, and other vehicles were used to maintain the roadblocks and otherwise to maintain the armed perimeter, and otherwise under color of executing the laws at Wounded Knee.

(d) Army or Air Force jeeps, cars, trucks, and aircraft were used to transport personnel and supplies essential to the maintenance of the armed perimeter, and otherwise under color of executing the laws at Wounded Knee.

(e) Regular Air Force personnel whose names are unknown to Plaintiffs were used to carry, in Air Force planes, Defendants Warner, Erickson, Colburn, Wood, and numerous United States marshals from place to place for purposes of meeting to plan and strategize, of communicating plans and instructions, and of carrying out plans and instructions, necessary to the maintenance of the armed perimeter, and otherwise under color of executing the laws at Wounded Knee.

(f) The following personnel were used to help maintain the armed perimeter, or to train others used to maintain the armed perimeter, or to maintain and repair military equipment used to maintain the armed perimeter, or otherwise undercolor [sic] of executing the laws at Wounded Knee:

(i) Regular Army or Air Force personnel: LTC Calvert (first name unknown), SFC Weal F. Schwagel, SFC Charles H. Davis, SFC Guy Smith, and others whose names are unknown to Plaintiffs; and

(ii) Members of the National Guard of the United States or Air National Guard of the United States, *on active federal duty*: SFC Mark M. Gaddis, SSGT James P. Murphy, SFC James L. Myers, Thomas N. Sladek, MSG Verner R. Roberts, SP5 Max S. Smith, Edward C. Binder, Laurence G. Lade, CW4 Dale M. Brunick, SGT Dolan S. Olson, SGT David A. Saunders, SP5 David J. Smith, S/SGT Bruce C. Peterson, MSG Emanual J. Torres, Maj. George F. Drew, CPT Thomas D. Brown, Col. Robert D. Chalberg, and others whose names are unknown to Plaintiffs.

(g) Other Army or Air Force personnel whose names are unknown to Plaintiffs were used in various ways to maintain the armed perimeter or otherwise under color of executing the laws at Wounded Knee.

(h) Army or Air Force—weapons, ammunition, flares, gas grenades, and other supplies and equipment were used to maintain the armed perimeter or otherwise under color of executing the laws at Wounded Knee.

(i) Army personnel and equipment were prepositioned for use to maintain the armed perimeter or otherwise under color of executing the laws at Wounded Knee.

SECOND SET OF CLAIMS:
AERIAL SEARCHES AND SURVEILLANCE

23. Paragraphs 17 through 22 are incorporated by reference herein.

24. (a) At times when each of the Plaintiffs was present within the armed perimeter around Wounded Knee, and particularly on March 2, March 3, March 8, and April 10, 1973, Defendants caused the Plaintiffs to be subjected

to aerial photographic and visual search and surveillance from aircraft, by at least eight separate sorties.

(b) The material acts by which each respective Defendant participated in causing these searches and this surveillance are specified in paragraphs 41 through 55, which are incorporated by reference herein.

(c) The searches and surveillance were done or caused to be done by the Defendants for the purpose of effectively maintaining the armed perimeter and otherwise under color of executing the laws at Wounded Knee.

25. By the actions of Defendants alleged in paragraph 24, each Plaintiff was searched against his or her will; the actions of each Plaintiff were subjected to surveillance against his or her will; and the privacy of each Plaintiff was invaded and destroyed.

26. The actions of Defendants alleged in paragraph 24 were unlawful—and thus the searches were unreasonable contrary to the Fourth Amendment of the Constitution, and the surveillance and invasions of privacy were unconstitutional contrary to the Fourth Amendment and other provisions of the Constitution—for the reason that Defendants accomplished those actions by means of the unconstitutional and felonious use of parts of the United States Army or Air Force, without any legal authority and contrary to Title 18 U.S.C. section 1385 and other provisions of law. Specifically, Defendants used or caused to be used the United States Army or Air Force as follows to conduct the aerial searches and surveillance:

(a) Air Force aircraft, fuel, equipment, and supplies were used for each sortie.

(b) For at least one sortie each, the following regular Army or Air Force personnel were used: Defendant Warner, and a regular Air Force pilot whose name is unknown to Plaintiffs.

(c) For other sorties, the following members of the Air National Guard of the United States *on active federal duty* were used as pilots or as navigators: Lt. Col. Billy J. Pegram (pilot), Maj. John J. Knott (pilot), Lt. Carl A. Lorenzen (pilot), Capt. Varis Purkalitis (navigator), Capt. Garfield J. Fricke (navigator), Capt. Raymond Hesse (navigator), and Maj. George P. Graves (navigator).

(d) For the several sorties, the following members of the Air National Guard of the United States *on active federal duty* were used as ground support personnel: MSGT Russell L. Carlson, MSGT John D. Vangroningen, SMSGT James E. Mikkelson, MSGT Ramon E. Johnson, SSGT Kenneth M. Hartz, TSGT James C. Hansen, and SSGT Ronald E. Malousek.

THIRD SET OF CLAIMS: ASSAULT, DEATH, AND PROPERTY DEPRIVATION AND DESTRUCTION

27. Paragraphs 17 through 26 are incorporated by reference herein.

28. The material acts by which each respective Defendant participated in causing the actions alleged in the several paragraphs of this Third Set of Claims are specified in paragraphs 41 through 55, which are incorporated by reference herein.

29. The actions alleged in the several paragraphs of this Third Set of Claims to have been done or caused to be done by Defendants were done or caused to be done under color of executing the laws.

30. All of the Plaintiffs, while confined within the armed perimeter around Wounded Knee, were subjected to periodic and repeated assaults by intense aimed and random rifle and carbine fire directed into the area within which they were confined, by deputies or agents of Defendants acting as authorized or directed by Defendants. This caused each Plaintiff repeatedly to incur grave risk

of death or grave bodily injury, and to suffer great fear, anxiety, and fright on that account. These assaults were unlawful and contrary to the Eighth and Fifth Amendments and other provisions of the United States Constitution for the reason that the weapons and ammunition used in the assaults were parts of the United States Army or Air Force so used or caused to be used by Defendants unconstitutionally and feloniously, without legal authority and contrary to Title 18 U.S.C. section 1385 and other provisions of law.

31. Buddy Lamont, deceased son of Plaintiff Agnes Lamont, was killed while he slept in a church pew while confined within the armed perimeter around Wounded Knee, by a projectile fired by an unknown deputy or agent of Defendants acting as authorized or directed by Defendants. Buddy Lamont was thereby deprived of his life, for which injury Agnes Lamont sues as his representative; and Agnes Lamont was thereby deprived of her son's society, support, love, comfort, advice, and assistance, for which injuries she sues in her own right. The killing of Buddy Lamont and the consequent injuries were unlawful and contrary to the Eighth and Fifth Amendments and other provisions of the United States Constitution for the reason that the weapon and the ammunition used to kill him were parts of the United States Army or Air Force being so used or caused to be used by Defendants unconstitutionally and feloniously, without legal authority and contrary to Title 18 U.S.C. section 1385 and other provisions of law, and because done under the circumstances alleged in paragraph 30 and in paragraphs 17 through 22.

32. During the time when Defendants were maintaining or causing to be maintained the armed perimeter around Wounded Knee, one or more deputies or agents or Defendants acting as authorized or directed by Defendants fired one or more incendiary flares into grasslands within the armed perimeter, which ignited a fire or fires which

consumed and destroyed the homes, and belongings therein, of Plaintiffs Rachel White Dress, Eddie White Dress, Helen Red Feather, and Vicki Little Moon, whereby each of those Plaintiffs was deprived of that property. Those deprivations were unlawful and contrary to the Fifth Amendment of the Constitution for the reason that the flare or flares and launcher or launchers so used, and the personnel who used or instructed others how to use them, were parts of the United States Army or Air Force being so used or caused to be used by Defendants unconstitutionally and feloniously, without legal authority and contrary to Title 18 U.S.C. section 1385 and other provisions of law, and because done under the circumstances alleged in paragraphs 17 through 22 or paragraph 30.

33. During and at the end of the period when Defendants were maintaining or causing to be maintained the armed perimeter around Wounded Knee, each Defendant was deprived of various items of valuable personal property by deputies or agents of Defendants acting, and using armed force or threat of armed force, as authorized or directed by Defendants. Those deprivations were unlawful and contrary to the Fifth Amendment of the Constitution for the reason that the arms used in the force of threat of force were parts of the United States Army or Air Force being so used or caused to be used by Defendants unconstitutionally and feloniously, without legal authority and contrary to Title 18 U.S.C. section 1385 and other provisions of law, and because done under the circumstances alleged in paragraphs 17 through 22.

FOURTH SET OF CLAIMS:
EXEMPLARY AND PUNITIVE DAMAGES

34. Paragraphs 17 through 33, 41 through 49, and 53 through 55 are incorporated by reference herein.

35. While acting as alleged in this Second Amended Complaint, Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach each knew that in the absence of the actions taken by Defendants and their deputies and agents the persons confined within the armed perimeter at Wounded Knee posed no threat of bodily harm to any person, and posed no threat to the Nation, to the State of South Dakota, or to the Pine Ridge Indian Reservation or the village of Wounded Knee.

36. In acting as alleged in this Second Amended Complaint, Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach each so acted wilfully or wantonly, and by reason of a belief that the presence of the persons confined within the armed perimeter at Wounded Knee constituted a source of irritation and embarrassment to the then President and Administration of the United States, and to the Department of Justice in particular.

37. While acting as alleged in this Second Amended Complaint, Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach each knew, or a reasonable person in their respective positions would have known: (a) that the use of any part of the United States Army or Air Force under color of executing the laws under the circumstances prevailing at the times and places of their material acts was not only unauthorized by law, but was prohibited and made punishable by law as a felony; and (b) that such use therefore rendered the confinement, searches, and other measures for which such use was made clearly unreasonable and unconstitutional, and violative of clearly established constitutional rights.

38. In acting as alleged in this Second Amended Complaint, Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach each sought to conceal the unlawful use of Army or Air Force personnel under color of executing the laws at Wounded Knee, by

causing Defendant Warner and other Army or Air Force personnel so used to wear civilian clothing so as to disguise or conceal their military character.

39. Individually, and by conspiring and agreeing with one another to this end, Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach wilfully and disingenuously failed to disclose complete information revealing the full extent of their use of parts of the Army and Air Force under color of executing the laws at Wounded Knee, when such information was requested from one or more of them by the United States Senate Committee on Interior and Insular Affairs during that Committee's investigative inquiries during and immediately after the ten week period following February 27, 1973.

40. The several actions of Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach alleged in paragraphs 35 through 39, respectively, each render so flagrant, reprehensible, and culpable the other actions of those same Defendants alleged in this Second Amended Complaint to have injured Plaintiffs that judgment against each of these eight Defendants for substantial exemplary or punitive damages is justified and required.

MATERIAL ACTS OF EACH DEFENDANTS

41. Each Defendant personally participated in the planning authorization, approval, and supervision or direction of the actions alleged in this Second Amended Complaint, including the use of parts of the United States Army or Air Force under color of executing the laws at Wounded Knee.

42. In addition, Defendant Kleindienst personally directed Defendant Sneed and certain other Defendants to utilize the Directorate of Military Support and other parts of the United States Army or Air Force to plan and assist in carrying out the colorable execution of the laws at Wounded Knee, including the actions alleged in this Second Amended Complaint.

43. In addition, Defendant Sneed functioned as overall central coordinator, supervisor, and director in Washington, D.C., for the entire process of colorably executing the laws at Wounded Knee during the material period of time, including the actions alleged in this Second Amended Complaint. Among other things he gave material instructions to Defendants Erickson, Colburn, Trimbach, and Warner; authorized and approved the use of various parts of the United States Army or Air Force for aerial search and surveillance, for maintenance of the armed perimeter, and otherwise as alleged herein; and, as a member of the Steering Committee responsible by regulation for control and direction of the Directorate of Military Support, unlawfully used the Directorate of Miltary Support and other personnel of the Army or Air Force to plan and assist in carrying out the colorable execution of the laws at Wounded Knee at alleged in this Second Amended Complaint. He also testified disingenuously before the United States Senate Committee on Interior and Insular Affairs to avoid revealing the use made of the Army and Air Force under color of executing the laws at Wounded Knee.

44. In addition, Defendant Belieu, as Executive Agent for the Department of Defense and as Chair of the Steering Committee responsible by regulation for control and direction of the Directorate of Military Support, unlawfully used the Directorate of Military Support and other personnel of the Army or Air Force to plan and assist in carrying out the colorable execution of the laws at Wounded Knee as alleged in this Second Amended Complaint, and personally approved and authorized various particular instances of the use of parts of the Army and Air Force under color of executing the laws at Wounded Knee as alleged in this Second Amended Complaint.

45. In addition, Defendant Haig personally reviewed, commented upon, and approved operational concepts, attack plans, and rules of engagement for the use made or to be made of parts of the Army or Air Force under color of executing the laws at Wounded Knee, as alleged in this Sec-

ond Amended Complaint. As Vice Chief of Staff of the Army and a member of the Steering Committee responsible by regulation for control and direction of the Directorate of Military Support, he unlawfully used the Directorate of Military Support and other personnel of the Army or Air Force to plan and assist in carrying out the colorable execution of the laws at Wounded Knee as alleged in this Second Amended Complaint. He commanded, supervised, or controlled the material acts of defendant Warner and other military personnel.

46. In addition, Defendant Erickson functioned as ranking Department of Justice official in the vicinity of Wounded Knee, and personally participated there in most or all on-site strategic and tactical planning for, and supervision and control of, the colorable execution of the laws, and the use for that purpose of Defendant Warner and other parts of the United States Army or Air Force, as alleged in this Second Amended Complaint.

47. In addition, Defendant Wood as a Department of Justice official, sometimes in Washington, D.C., and sometimes in the vicinity of Wounded Knee, helped to supervise and direct the colorable execution of the laws at Wounded Knee, and the use for that purpose of Defendant Warner and other parts of the United States Army or Air Force, as allleged in this Second Amended Complaint.

48. In addition, Defendant Colburn personally acted, both in Washington, D.C., and in the vicinity of Wounded Knee, as chief supervising officer and commander of the United States marshals or deputy marshals colorably executing the laws at Wounded Knee and performing actions alleged in this Second Amended Complaint. He participated in the vicinity of Wounded Knee in most or all of the on-site strategic and tactical planning for, and supervision and control of, the colorable execution of the laws at Wounded Knee, as well as the use for that purpose of parts of the United States Army or Air Force, as alleged in this Second Amended Complaint. He personally approved, requested, and secured authorization from other Defendants

for, the use of parts of the Army or Air Force by United States marshals to maintain the armed perimeter, and the use of parts of the Air Force for aerial searches and surveillance to assist the United States marshals in colorably executing the laws at Wounded Knee. He personally used Defendant Warner as an advisor and co-worker to devise attack plans and other plans used or to be used under color of executing the laws at Wounded Knee; and he personally used various military officers to procure and provide military weapons, ammunition, armored and other military vehicles, and various other items of military supplies and equipment, to maintain the armed perimeter and to do other acts alleged in this Second Amended Complaint.

49. In addition, Defendant Trimbach personally acted, in the vicinity of Wounded Knee, as chief supervising officer and commander of the agents of the Federal Bureau of Investigation (FBI) colorably executing the laws at Wounded Knee and performing actions alleged in this Second Amended Complaint. He participated in the vicinity of Wounded Knee in most of all of the on-site strategic and tactical planning for, and supervision and control of, the colorable execution of the laws at Wounded Knee, as well as the use for that purpose of parts of the United States Army or Air Force, as alleged in this Second Amended Complaint. He personally approved, requested, and secured authorization from other Defendants for, the use of parts of the Army or Air Force by FBI agents to maintain the armed perimeter, and the use of parts of the Air Force for aerial searches and surveillance to assist the FBI agents under color of executing the laws at Wounded Knee. He personally used Defendant Warner as an advisor and co-worker to devise rules of engagement and other plans used or to be used under color of executing the laws at Wounded Knee; and he personally used various military officers to procure and provide military weapons, ammunition, armored and other military vehicles, and various

other items of military supplies and equipment, to maintain the armed perimeter and to do other acts alleged in this Second Amended Complaint.

50. In addition, Defendants Gleszer and Edwards as chief officers of the Directorate of Military Support, personally and by the use of their military subordinates, prepared or supervised the preparation of operational concepts and other plans for the use of parts of the Army or Air Force under color of executing the laws at Wounded Knee; ordered and supervised various measures of implementation of those plans; and otherwise approved and fulfilled requests of other Defendants for the use of parts of the Army or Air Force under color of executing the laws at Wounded Knee as alleged in this Second Amended Complaint. They approved, ordered, or otherwise caused the prepositioning of troops as alleged in this Second Amended Complaint, and supervised or coordinated the material acts of Defendant Warner and other personnel of the Army or Air Force.

51. In addition, Defendant Hay ordered, commanded, and supervised the use of Defendant Warner and other personnel of the Army or Air Force under color of executing the laws at Wounded Knee as alleged in this Second Amended Complaint.

52. In addition, Defendant Warner, as ranking military officer in the vicinity of Wounded Knee, personally participated in most or all on-site strategic and tactical decisions and instructions pertaining to the colorable execution of the laws at Wounded Knee, prepared or participated in the preparation of material rules of engagement, attack plans, and operational concepts, and supervised, approved, commanded, or directed most or all use of parts of the Army or Air Force under color of executing the laws as alleged in this Second Amended Complaint, including controlling the use of armored vehicles and other military personnel and equipment to maintain the armed perimeter; ordering and supervising aerial searches and

surveillance; and supervising the provision of military supplies, equipment, and personnel for instruction, training, maintenance, and other assistance and use.

53. Each Defendant conspired and acted in concert with one or more of the other Defendants with respect to and in order to accomplish the actions alleged in this Second Amended Complaint, and thereby ratified and approved and made himself a participant in all of the material acts of all of the other Defendants.

54. Each Defendant did his material acts knowing that those acts under the circumstances would probably or certainly cause injury to Plaintiffs or to others; and those acts violated clearly established statutory and constitutional rights of which each Defendant did know, or of which a reasonable person in their respective positions would have known.

55. Each Defendant who had supervisory authority over the actions of any person who performed any of the acts alleged in this Second Amended Complaint is responsible for the material actions of any such subordinate according to the principle of respondeat superior.

PRAYER FOR RELIEF

WHEREFORE:

(a) Each Plaintiff prays that for the injuries described in the First Set of Claims (paragraphs 17 through 22) he or she be awarded damages against each and all of the Defendants, jointly and severally, in such amount as may be justified for each Plaintiff by the proof to be presented at trial; and

(b) Each Plaintiff prays further that for the injuries described in the Second Set of Claims (paragraphs 23 through 26) he or she be awarded as damages against each and all of the Defendants, jointly and severally, the sum of five thousands dollars to each Plaintiff; and

(c) Each Plaintiff prays further that for the injuries described in the Third Set of Claims (paragraphs 27 through 33) he or she be awarded damages against each

and all of the Defendants, jointly and severally, in such amount as may be justified for each Plaintiff by the proof to be presented at trial; and

(d) Each Plaintiff prays further that for the reasons shown in the Fourth Set of Claims (paragraphs 34 through 40) he or she each be awarded separately against each of Defendants Kleindienst, Sneed, Belieu, Haig, Erickson, Wood, Colburn, and Trimbach the sum of one hundred thousand dollars as exemplary or punitive damages; and

(e) Each Plaintiff prays further that he or she be awarded against each and all of the Defendants, jointly and severally, all of his or her costs and disbursements incurred in maintaining this civil action, including reasonable attorneys' fees; and such other and further relief as the Court might deem just.

Original Complaint filed
February 27, 1975.
Amended Complaint dated
February 6, 1979.
Second Amended
Complaint dated
July 15, 1982.

/s/ DAVID E. ENGDAHL

DAVID E. ENGDAHL, ESQ.
University of Puget Sound School of Law
950 Broadway Plaza
Tacoma, Washington 98402
(206) 756-3485

KENNETH E. TILSEN, ESQ.
400 Minnesota Building
St. Paul, Minnesota 55101
(612) 224-7687

JAMES D. LEACH, ESQ.
508 7th St.
Rapid City, South Dakota 57701
(605) 348-5047

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Case No. 75-0271

AGNES LAMONT
Pine Ridge, South Dakota, (605) 867-5387
GLADYS BISSONETTE
Pine Ridge, South Dakota, (605) 867-5697
ELLEN MOVES CAMP
419 E. St. Patrick Street,
Rapid City, South Dakota (no telephone)
EUGENE WHITE HAWK
Manderson, South Dakota, (no telephone)
MARVIN GHOST BEAR
Batesland, South Dakota, (no telephone)
EDGAR BEAR RUNNER
Porcupine, South Dakota, (no telephone)
OSCAR BEAR RUNNER
Porcupine, South Dakota, (no telephone)
SEVERT YOUNG BEAR
Porcupine, South Dakota, (no telephone)
RACHEL WHITE DRESS
Wounded Knee, South Dakota, (no telephone)
HELEN RED FEATHER
Wounded Knee, South Dakota, (no telephone)
EDDIE WHITE DRESS
Wounded Knee, South Dakota, (no telephone)
VICKI LITTLE MOON
Wounded Knee, South Dakota, (no telephone)
MADONNA GILBERT
807 Fairview Street, Rapid City, South Dakota,
(605) 348-5629

LORELEI MEANS
807 Fairview Street, Rapid City, South Dakota,
(605) 348-5629
CARLA BLAKEY
Porcupine, South Dakota, (no telephone)
PLAINTIFFS,

v.

ALEXANDER HAIG
Supreme Allied Commander of Europe,
The Hague, Netherlands
WAYNE COLBURN
Room 358, 521 Twelfth St., N.W., Washington, D.C.
(202) 739-2127
RICHARD G. KLEINDIENST
JOSEPH T. SNEED
Ninth Circuit Court of Appeals, 7th and Mission,
San Francisco, California, (415) 556-6120
CHARLES D. ABLARD
Obermayer, Rebmann, Maxwell & Hippel, Suite 500,
2011 Eye St., N.W., Washington, D.C. 20006,
(202) 452-8833
JOSEPH H. TRIMBACH
Federal Bureau of Investigation, Federal Building,
Minneapolis, Minnesota, (612) 339-7861
RALPH E. ERICKSON
Erickson & Morrison, P.C., 2029 Century Park East,
Suite 1700, Los Angeles, California 90067, (213)
556-2345
HARLINGTON WOOD, JR.
United States District Court, United States Courthouse,
Springfield, Illinois, (217) 525-4340
FREDERICK BUZHARDT
Dowling, Dowling, Sanders & Dukes, P.A.,
Pope Avenue, Hilton Head, So. Carolina 29928,
(803) 785-4251

KENNETH BELIEU
Suite 601, 1625 K St., N.W., Washington, D.C. 20006,
(202) 393-6100, ext. 34
ROLLAND GLESZER
EDMUND EDWARDS
JOHN HAY
VOLNEY F. WARNER
DEFENDANTS.

AMENDED COMPLAINT FOR DAMAGES AND OTHER RELIEF

I.

SUMMARY OF CLAIMS

1. (a) This action arises out of unprecedented use by the Defendants, as officers or employees of the United States, of parts of the armed forces of the United States in defiance of a statute well known to them, and contrary to due process of law; a use, however, which was subtly disguised at the time and was afterwards deliberately concealed from Congress and covered up.

(b) The Defendants used United States military personnel and supplies and equipment to execute the laws against civilian citizens within the United States, an intrusion of the military into domestic civilian affairs which had been sternly prohibited by Congress for a century, and by our Constitution itself for almost two centuries.

(c) Each Defendant participated with the other Defendants in a conspiracy to use, did acts pursuant to that conspiracy to use, and did use or cause to be used, part or parts of the United States Army or Air Force to execute the laws in and around the Village of Wounded Knee on the Pine Ridge Indian Reservation during February,

March, April and May, 1973, to the injury of the Plaintiffs, and in violation of Title 18, United States Code sec. 1385 and of Title 18, United States Code sec. 371.

(d) Title 18 U.S.C. 1385 makes it unlawful, except in circumstances not present in this case, for any person to use "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws. . . ."

(e) Title 18 U.S.C. 371 makes it unlawful "If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy . . . ."

2. In addition, each Defendant participated with the other Defendants in a conspiracy to cause, did acts pursuant to that conspiracy to cause, and did cause, various members of the United States Army or Air Force to go disguised as civilians on the highway in or around the Village of Wounded Knee with the intent and with the effect of preventing or hindering Plaintiffs in the free exercise and enjoyment of their liberty, freedom of movement, right to travel, right of assembly, right to petition the government for redress of grievances, right to the free exercise of religion, right to privacy, right to be free from unreasonable search, surveillance, seizure, and imprisonment, right not to have military personnel or other military resources employed or utilized against them, and other rights secured to them by the laws and Constitution of the United States; which conspiracy and acts were in violation of Title 18, United States Code, Sec. 241 and Title 18, United States Code, Sec. 2.

3. In addition, each Defendant, and all Defendants jointly, used part or parts of the United States Army or Air Force unlawfully to execute the law in and around the Village of Wounded Knee, and in so doing, deprived Plaintiffs of and hindered or prevented them in the exercise and enjoyment of the same rights enumerated above, secured to them by the laws and Constitution of the United States.

4. Defendants did all of the acts alleged in this Complaint in their official capacities, purporting to do so, and purporting to have authority to do so, under law or under color of legal authority, and by virtue of the offices that they held. Because the Defendants themselves included the highest officials of the United States Department of Justice, no proceedings against any of the Defendants have ever been commenced under the applicable criminal statutes.

5. Defendants did all of the acts alleged in this Complaint willfully and wantonly, knowing that they were forbidden by law to use any part of the Army or Air Force to execute the laws.

6. (a) Defendants moreover did all of the acts alleged in this Complaint knowing that nothing done by any Indian or other person at Wounded Knee during the time material to this Complaint threatened bodily harm to any resident of Wounded Knee or any government official, or posed any threat to the United States, or to the State of South Dakota, or to the Pine Ridge Reservation.

(b) They acted as alleged herein for the reason that the events occurring at Wounded Knee were perceived by them as a source of irritation and embarrassment to the administration of the incumbent President of the United States in general, and to the Department of Justice in particular.

II.

IDENTIFICATION OF PLAINTIFFS

7. The Plaintiffs in this action are the following:

(a) Agnes Lamont is a resident of the Pine Ridge Indian Reservation, who spent some time in the Village of Wounded Knee during the seige of Wounded Knee by Defendants pursuant to the conspiracy or conspiracies alleged in this Complaint, and whose only

son, Lawrence (Buddy) Lamont, was killed pursuant to Defendants' conspiracy or conspiracies herein alleged.

(b) Gladys Bissonette is a resident of the Pine Ridge Indian Reservation who was in the Village of Wounded Knee during substantially all of the time that Wounded Knee was beseiged pursuant to the conspiracy or conspiracies of Defendants alleged in this Complaint.

(c) Ellen Moves Camp is a resident of the Pine Ridge Indian Reservation who was in the Village of Wounded Knee during substantially all of the time that Wounded Knee was beseiged pursuant to the conspiracy or conspiracies of Defendants alleged in this Complaint.

(d) Eugene White Hawk is a resident of the Pine Ridge Indian Reservation and a district leader of the Oglala Sioux Tribe.

(e) Marvin Ghost Bear is a resident of the Pine Ridge Indian Reservation, and is presently a member of the Tribal Council.

(f) Edgar Bear Runner is a resident of the Pine Ridge Indian Reservation and is presently Chairman of the Porcupine District Council on the Pine Ridge Reservation.

(g) Oscar Bear Runner is a resident of the Pine Ridge Indian Reservation who was in the Village of Wounded Knee during the time when Wounded Knee was beseiged pursuant to the conspiracy or conspiracies of Defendants alleged in this Complaint.

(h) Severt Young Bear is a resident of the Pine Ridge Indian Reservation who was in the Village of Wounded Knee during the time when Wounded Knee was beseiged pursuant to the conspiracy or conspiracies of Defendants alleged in this Complaint.

(i) Rachel White Dress is a resident of the Village of Wounded Knee.

(j) Helen Red Feather is a resident of the Village of Wounded Knee.

(k) Eddie White Dress is a resident of the Village of Wounded Knee.

(l) Vicki Little Moon is a resident of the Village of Wounded Knee.

(m) Madonna Gilbert is an Indian who was in the Village of Wounded Knee during substantially all of the time that Wounded Knee was beseiged pursuant to the conspiracy or conspiracies of Defendants alleged in this Complaint.

(n) Lorelie Means is an Indian who was in the Village of Wounded Knee during substantially all of the time that Wounded Knee was beseiged pursuant to the conspiracy or conspiracies of Defendants alleged in this Complaint.

(o) Carla Blakey is an Indian.

III.

IDENTIFICATION OF DEFENDANTS AND LOCATION OF THEIR ACTIONS GIVING RISE TO THE CAUSE OF ACTION

8. The Defendants in this action, their positions in the United States government, and the locations of their material actions were as follows:

(a) Alexander Haig, during the time material to this Complaint, was a Lieutenant General and was Vice Chief of Staff of the United States Army. When this suit was commenced, he was an officer or employee of the United States in a different capacity. All of his acts giving rise to this cause of action as more particularly alleged in paragraphs 18, 19, 20, 24, 33, 34, 35, 36, 39, 40, 41, 43, 44, and other

paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(b) Wayne Colburn, during the time material to this Complaint, was Director of the United States Marshal's Service and remained in that position at the time when this suit was commenced. As more particularly alleged in paragraphs 16, 18, 21, 22, 24, 27, 29, 30, 32, 33, 34, 35, 38, 39, 40, 41, and other paragraphs, many of his acts giving rise to this cause of action were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C., and others were performed pursuant to orders and instructions issued in Washington, D.C., by other Defendants who were his superiors, who maintained in Washington, D.C., close control and supervision over his material acts elsewhere.

(c) Richard G. Kleindienst, during the time material to this Complaint, was Attorney General of the United States. When this suit was commenced, he was privately employed in Washington, D.C. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 16, 18, 19, 20, 21, 25, 29, 30, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, and other paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(d) Joseph T. Sneed, during the time material to this Complaint, was Deputy Attorney General of the United States. When this suit was commenced, he was an officer or employee of the United States in a different capacity. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 16, 18, 19, 20, 21, 25, 26, 29, 30, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, and other paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(e) Charles D. Ablard, during the time material to this Complaint, was Associate Deputy Attorney General of the United States. When this suit was commenced, he was employed by the United States in the office of Chief Counsel, Department of Defense, The Pentagon, Washington, D.C. As more particularly alleged in paragraphs, 16, 20, 21, 25, 33, 34, 35, 36, 39, 40, 41, 42, 44, and other paragraphs, most of his acts giving rise to this cause of action were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C., and the others were performed pursuant to orders and instructions issued in Washington, D.C., by other Defendants who were his superiors, who maintained in Washington, D.C., close control and supervision over his material acts elsewhere.

(f) Joseph H. Trimbach, during the time material to this Complaint, was Federal Bureau of Investigation Special Agent in Charge in and around the Vallage [sic] of Wounded Knee. When this suit was commenced, he was still employed by the United States in the same or essentially the same position or capacity. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 17, 18, 21, 29, 30, 32, 33, 34, 35, 39, 40, 41, and other paragraphs, were performed pursuant to orders and instructions issued in Washington, D.C., by other Defendants who were his superiors, who maintained in Washington, D.C., close control and supervision over his material acts elsewhere.

(g) Ralph E. Erickson, during the time material to this Complaint, was a Special Assistant to the Attorney General of the United States. He no longer was employed in that position at the time when the suit was commenced. As more particularly alleged in paragraphs 16, 18, 21, 23, 24, 26, 27, 29, 30, 32, 33,

34, 35, 39, 40, 41, 42, and other paragraphs, many of his acts giving rise to this cause of action were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C., and others were performed pursuant to orders and instructions issued in Washington, D.C., by other Defendants who were his superiors, who maintained in Washington, D.C., close control and supervision over his material acts elsewhere.

(h) Harlington Wood, during the time material to this Complaint, was Assistant Attorney General of the United States in charge of the Civil Division of the Department of Justice. When this suit was commenced, he was an officer or employee of the United States in a different capacity. As more particularly alleged in paragraphs 21, 25, 26, 33, 34, 35, 39, 40, 41, 42, and other paragraphs, many of his acts giving rise to this cause of action were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C., and others were performed pursuant to orders and instructions issued in Washington, D.C., by other Defendants who were his superiors, who maintained in Washington, D.C., close control and supervision over his material acts elsewhere.

(i) J. Frederich Buzhardt, during the time material to this Complaint, was General Counsel to the Office of the Secretary of Defense. He was no longer employed in that position at the time this suit was commenced. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 18, 19, 25, 27, 29, 30, 33, 34, 35, 36, 39, 40, 41, 44, and other pargaraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(j) Kenneth Belieu, during the time material to this Complaint, was Undersecretary of the Army. He no longer was employed in that position at the time when this suit was commenced. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 25, 26, 34, 35, 36, 39, 40, 41, 43, 44, and other paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(k) Rolland Gleszer, Major General, during the time material to this Complaint until March 30, 1973, was Commander of the Directorate of Military Support. He no longer was employed in that position at the time when this suit was commenced. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 24, 29, 30, 34, 35, 36, 39, 40, 41, 44, and other paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(l) Edmund Edwards, Brigadier General, during the time material to this Complaint, was Deputy Commander of the Directorate of Military Support until March 30, 1973, at which time he became its acting commander. He no longer was employed in that position at the time when this suit was commenced. All of his acts giving rise to this cause of action, as more particularly alleged in paragraphs 34, 35, 36, 39, 40, 41, 43, 44, and other paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C.

(m) John Hay, Lieutenant General, during the time material to this Complaint was Commander of the Eighteenth Airborne Corps, United States Army. He no longer was employed in that position at the time when this suit was commenced. All of his acts giving rise to this cause of action, as more particularly alleged

in paragraph 19 and other paragraphs, were performed in Washington, D.C., and constituted the transacting of business in Washington, D.C., or were performed elsewhere pursuant to orders and instructions issued in Washington, D.C., by other Defendants.

(n) Volney F. Warner, during the time material to this Complaint, was a Colonel and Chief of Staff of the 82nd Airborne Division, United States Army. After the events giving rise to this cause of action, he was promoted to Brigadier General and made the Assistant Division Commander of the 82nd Airborne. At the time when this suit was commenced, he was an officer or employee of the United States in the same position or another command position in the 82nd Airborne Division, or another position in the United States Army. As more particularly alleged in paragraphs 24, 26, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 44, and other paragraphs, many of his most significant acts giving rise to this cause of action were performed in Washington, D.C, and constituted the transacting of business in Washington, D.C., and the others were performed pursuant to orders and instructions issued in Washington, D.C., by other Defendants who were his superiors, who maintained in Washington, D.C., close control and supervision over his material acts elsewhere.

IV.

JURISDICTION

9. This Court has jurisdiction of this Complaint under Title 28 U.S.C., Sec. 1343(4), and under Title 28 U.S.C., Sec. 1331. The amount in controversy exceeds $10,000.00, exclusive of interest and costs. Personal jurisdiction over the parties is variously based upon Title 28 U.S.C., Sec. 1391(e), and Fed. R. Civ. P. 4 and D.C. Code, Sec. 13-423(a)(1).

V.

VENUE

10. Venue of this action in the district for the District of Columbia is proper under Title 28 U.S.C., Sec. 1391(e) as to Defendants Colburn, Ablard, Trimbach, and Warner, because at the time when this suit was commenced, each of them was a federal officer or employee in the same or equivalent position he had occupied when the cause of action arose.

11. Venue of this action in the district for the District of Columbia is proper under Title 28 U.S.C. sec. 1391(e) as to Defendants Haig, Sneed, and Wood because at the time when this suit was commenced each of them was a federal officer or employee, although in a position different from that which he had occupied when the cause of action arose.

12. Venue of this action in the district for the District of Columbia is proper under Title 28 U.S.C. sec. 1391(b) as to all of the Defendants, because the District of Columbia is the district in which the claim or the cause of action arose, that district being, as alleged with greater particularity below, the district in which the alleged conspiracy was formed; in which plans and strategy in pursuance thereof were continually fashioned; in which all policy and strategy decisions concerning the Defendants' operations at Wounded Knee were made; to which the Defendants present at Wounded Knee returned periodically for strategic planning with and instructions from the other Defendants; from which all supervision and control of the operations at Wounded Knee was conducted; where all proposed uses of parts of the Army or Air Force by any of the Defendants were considered and either approved or disapproved, authorized or unauthorized; which is the headquarters of the United States Department of Justice and of the United States Department of Defense, whose

Defendant principal officials there acting were the prime conspirators and prime decision-making operatives in this matter; and where all or nearly all of the relevant documentary evidence and much of the relevant testimonial evidence is to be found.

VI.

DETAIL OF DEFENDANTS' ACTS GIVING RISE TO THIS CLAIM

13. Defendants did conspire as heretofore alleged.

14. Each of the acts described in this Complaint was done or caused to be done by one or more of the Defendants wilfully, and either (a) jointly, or (b) as part of the conspiracy or conspiracies alleged, or (c) in pursuance of the conspiracy or conspiracies alleged.

Initiation of Plans.

15. On or about February 28, 1973, Defendants Kleindienst, Sneed, and Ablard met together in Washington, D.C. and together there made plans for the use of parts of the United States Army or Air Force to execute the laws in and around the Village of Wounded Knee.

16. (a) On February 28, 1973, Defendants Erickson and Colburn met in Washington, D.C., with some or all of Defendants Kleindienst, Sneed, and Ablard, and participated in making the aforesaid plans for use of parts of the United States Army or Air Force to execute the laws in and around the Village of Wounded Knee.

(b) Late in the evening of February 28, 1973, Erickson and Colburn travelled from Washington, D.C. to Gordon, Nebraska, enroute to Wounded Knee, pursuant to the plan and design agreed to by all the Defendants named in this paragraph, according to which Erickson as ranking Department of Justice official at Wounded Knee and Colburn as Director of the United States Marshal's Service

and its Special Operations Group personnel deployed at Wounded Knee were to effectuate, with constant consultation with, supervision by, and direction from the Defendants remaining in Washington, D.C., the aforesaid plans for use of parts of the United States Army or Air Force to execute the laws in and around Wounded Knee.

Armored Personnel Carriers.

17. (a) On or about February 28, 1973, Defendant Trimbach as ranking Federal Bureau of Investigation official at Wounded Knee acting under direct supervision and control of Defendants who were acting in Washington, D.C., requested General Greenleaf, commander of the South Dakota National Guard, or his delegate, to provide two armored personnel carriers and certain other military equipment for use by Defendants Trimbach and Colburn and their subordinates to execute the laws in and around the Village of Wounded Knee.

(b) Trimbach sought and received approval of this request in Washington, D.C. from Mr. Webster, Department of the Army General Counsel.

(c) The armored personnel carriers were provided on or about February 28, 1973.

(d) Those armored personnel carriers were part of the United States Army or Air Force.

18. (a) On or about March 3, 1973, Defendants Colburn, Trimbach, and Erickson, and Defendants Sneed or Kleindienst acting in Washington, D.C. requested the commander of the Nebraska National Guard, or his delegate, to provide fifteen armored personnel carriers for use by Defendants Trimbach and Colburn and their subordinates to execute the laws in and around the Village of Wounded Knee.

(b) The request was approved by Defendants Buzhardt and Haig in Washington, D.C., on or about March 3, 1973.

(c) The armored personnel carriers were provided on or about March 4, 1973.

(d) Those armored personnel carriers were part of the United States Army or Air Force.

Use of Defendant Warner.

19. (a) On or about March 2, 1973, Defendant Hay, pursuant to instructions given to him by Defendants acting in Washington, D.C., ordered Defendant Warner to go to Wounded Knee as Department of Defense representative and to assist in planning and carrying out the execution of the laws.

(b) Warner was a part of the United States Army.

20. (a) At the scene of operations at Wounded Knee, Warner functioned pursuant to orders and instructions given to him by Defendants acting in Washington, D.C. as a military assistance advisor with regard to strategy and tactics in the execution of the laws.

(b) Warner was given by the other Defendants, including those acting in Washington, D.C., and did exercise, an equal vote in on-the-scene decision making with regard to the execution of the laws in and around the Village of Wounded Knee.

21. (a) Defendants Colburn, Trimbach, Kleindienst, Sneed, Ablard, Erickson, and Wood used Warner to control the deployment of armored personnel carriers to execute the laws in and around Wounded Knee.

(b) Defendants Kleindienst, Sneed, and Ablard, in so doing, acted in Washington, D.C.

(c) Defendants Colburn, Erickson, and Wood, in so doing, acted sometimes at Wounded Knee and sometimes in Washington, D.C.

22. Between about March 3, 1973, and about March 5, 1973, Defendant Colburn used Warner to assist him in devising and revising a basic attack plan for the purpose of executing the laws in and around Wounded Knee.

23. Between about March 3, 1973, and about March 5, 1973, Defendant Erickson, acting at Wounded Knee but pursuant to instructions and orders given to him by Defendants acting in Washington, D.C., used Warner as a consultant and advisor concerning rules of engagement for purposes of executing the laws in and around Wounded Knee.

24. (a) The plans and rules mentioned in paragraphs 22 and 23 above continued to be revised by Warner, Colburn, and Erickson, and were submitted for approval to, reviewed by, and commented upon by Defendant Gleszer in Washington, D.C., Defendant Haig in Washington, D.C., and General Creighton Abrams, Chief of Staff of the United States Army in Washington, D.C.

(b) In particular, on or about March 12, 1973, Warner communicated to Haig and Abrams in Washington, D.C. an attack plan prepared by Warner and Colburn for executing the laws in and around Wounded Knee, under which attack plan Colburn would be in charge with Warner acting as his advisor.

25. The plans and rules mentioned in paragraphs 22 and 23 were studied, debated and revised in Washington, D.C. by various Defendants, including Kleindienst, Sneed, Ablard, Wood, Buzhardt, and Belieu, those Defendants who acted in Washington, D.C. reserving to themselves final decision concerning all such plans and rules to be employed or considered for employment for purposes of executing the laws in and around Wounded Knee.

26. From about March 19, 1973, until about March 23, 1973, and again on or about March 29, 1973, Warner met with Defendants Sneed, Belieu, Wood, and Erickson in Washington, D.C. engaging there with them in conferences to formulate plans, policies, and tactics for executing the laws in and around Wounded Knee, and Warner was at those times and at that place used by said other Defendants in executing the laws.

Aerial Photographic Reconnaissance.

27. (a) On or about March 2, 1973, Defendant Erickson or Defendant Colburn or Defendant Warner requested approval from Defendant Buzhardt in Washington, D.C. for military aerial photographic reconnaissance of the Wounded Knee area to aid in executing the laws.

(b) Pursuant to this request and with Buzhardt's approval given in Washington, D.C., on March 2, 1973, two sorties were flown by military aircraft over the Wounded Knee area for that purpose.

(c) One of the two aircraft utilized was flown by an officer of the regular United States Air Force.

(d) The pilot of the other aircraft was Lt. Col. Billy J. Pegram.

(e) The navigators were Capt. Varis Purkalitis and Capt. Garfield J. Fricke.

(f) Ground support for the sorties was provided by Master Sergeant Russell L. Carlson and Master Sergeant John D. Vangroningen.

(g) Pegram, Purkalitis, Fricke, Carlson, and Vangroningen were at that time members of the Air National Guard of the United States, and at that time and for that purpose were on active federal duty.

(h) The aircraft used, the regular Air Force pilot, and the named members of the Air National Guard of the United States on active federal duty used for these sorties to aid in executing the laws, all were parts of the United States Army or Air Force.

(i) The cost of these sorties was paid by the United States Department of Justice.

28. (a) On or about March 3, 1973, Defendant Warner flew or was flown in a military aircraft over the Wounded Knee area for the purpose of visual reconnaissance in order to aid in executing the laws.

(b) Warner and the aircraft in which he flew were parts of the United States Army or Air Force.

29. (a) On or about March 7, 1973, Defendant Erickson or Defendant Colburn or Defendant Trimbach or Defendant Sneed or Defendant Kleindienst or Defendant Warner requested in Washington, D.C., and Defendant Buzhardt or Defendant Gleszer or the Chief of Staff of the United States Air Force authorized in Washington, D.C., additional military aircraft photographic reconnaissance flights over the Wounded Knee area, to aid in executing the laws.

(b) Pursuant to such request and approval, on March 8, 1973, two sorties were flown by a single military aircraft over the Wounded Knee area for that purpose.

(c) The pilot was Lt. Col. Billy J. Pegram.

(d) The navigator was Capt. Raymond C. Hesse.

(e) Ground support for the sorties was provided by SMSGT James E. Mikkelsen, MSGT Russell L. Carlson, MSGT John D. Vangroningen, TSGT Ramon E. Johnson, and SSCT Kenneth M. Hartz.

(f) Pegram, Hesse, Mikkelsen, Carlson, Vangroningen, Johnson, and Hartz were at that time members of the Air National Guard of the United States and at that time and for that purpose were on active federal duty.

(g) The aircraft used, and the named members of the Air National Guard of the United States on active federal duty used for these photographic reconnaissance sorties to aid in executing the laws, all were parts of the United States Army or Air Force.

(h) The cost of these sorties was paid by the United States Department of Justice.

30. (a) On or about April 9, 1973, Defendant Erickson or Defendant Colburn or Defendant Trimbach or Defendant Sneed or Defendant Kleindienst or Defendant Warner requested in Washington, D.C., and Defendant Buzhardt or Defendant Gleszer or some other official in the Department of Defense authorized in Washington,

D.C., additional military aircraft photographic reconnaissance flights over the Wounded Knee area, to aid in executing the laws.

(b) Pursuant to such request and approval, on April 10, 1973, three sorties were flown, using three separate aircraft.

(c) The pilots were Lt. Col. Billy J. Pegram, Maj. John J. Knott, and Lt. Carl A. Lorenzen.

(d) The navigators were Maj. George P. Graves, Capt. Raymond C. Hesse, and Capt. Varis Purkalitis.

(e) Ground support personnel were SMSGT James N. Mikkelsen, MSGT John D. Vangroningen, TSGT James C. Hansen, SSGT Kenneth M. Hartz, and SSGT Ronald E. Malousek.

(f) Pegram, Knott, Lorenzen, Graves, Hesse, Purkalitis, Mikkelsen, Vangroningen, Hansen, Hartz, and Malousek were at that time members of the Air National Guard of the United States, and at that time and for that purpose were on active federal duty.

(g) The aircraft used, and the named members of the Air National Guard of the United States on active federal duty used for these photographic reconnaissance sorties to aid in executing the laws, all were parts of the United States Army or Air Force.

(h) The cost of these sorties was paid by the United States Department of Justice.

Use of Other Army and Air Force Personnel.

31. (a) On or about March 2, 1973, Defendant Warner requested, and the commander of the Sixth United States Army ordered, that Col. Jack C. Potter go to the Wounded Knee area as Army Logistics Coordinator to manage requests for, inventory, and provide when approved, Army and Air Force equipment for use by federal civil authorities in executing the laws in and around Wounded Knee.

(b) Potter went to Wounded Knee and acted in this capacity from about March 3, 1973, to about March 29, 1973.

(c) Potter and each such item of equipment were parts of the United States Army or Air Force.

32. (a) During the month of March, 1973, Defendants Sneed and Kleindienst, each acting in Washington, D.C., and Defendants Trimbach, Colburn, Warner, and Erickson, each acting pursuant to orders and instructions given to them by Defendants acting in Washington, D.C., used Potter to assist in setting up a tactical operations center to improve intelligence and other operations related to the execution of the laws in and around Wounded Knee.

(b) On or about March 29, 1973, Col. William Williamson replaced Potter, and was used by the same Defendants acting in the same locations as Army Logistics Coordinator to manage requests for, inventory, and provide military equipment for use by federal civilian authorities in executing the laws in and around Wounded Knee.

(c) On or about April 30, 1973, LTC Harold Ankeman replaced Col. Williamson, and was used by the same Defendants acting in the same locations to perform for them in the same role until May 17, 1973.

(d) On or about March 25, 1973, the same Defendants acting in the same locations began to use Col. Joseph Baker to assist Defendant Warner to execute the laws in and around Wounded Knee.

(e) On or about May 7, 1973, and continuing until May 15, 1973, the same Defendants acting in the same locations used LTC R. F. Ventrella to assist Defendant Warner to execute the laws in and around Wounded Knee.

(f) Williamson, Ankenman, Baker, and Ventrella, as well as Potter, were parts of the United States Army or Air Force.

33. Defendants Kleindienst, Sneed, Ablard, Haig, Buzhardt, Wood, and Erickson acting in Washington, D.C., and (in accordance with their orders and instructions issued from Washington, D.C.) Defendants Colburn, Trimbach, Erickson, Wood, and Warner at Wounded Knee:

(a) On or about April 27, 1973, used LTC Calvert, a chemical officer and regular officer in the United States Army or Air Force, to train members of the United States Marshal's Service in the use of CS gas and E8 CS launchers to execute the laws in and around Wounded Knee;

(b) During March and April, 1973, used members of the National Guard of the United States on federal status (FTTD) to provide training, maintenance, and repair necessary to the use of the armored personnel carriers and jeep-mounted Xenon lights being used to execute the laws in and around the Village of Wounded Knee, these members of the National Guard of the United States on federal status being parts of the United States Army or Air Force;

(c) At various times during March, April, and May, 1973, used the following enlisted personnel of the United States Army or Air Force from Fort Carson to aid in the execution of the laws in and around Wounded Knee: SFC Weal F. Schwagel, SFC Charles H. Davis, and SFC Guy Smith;

(d) At various times during February, March, April, and May, 1973, used the following members of the National Guard of the United States or the Air National Guard of the United States, on active federal duty, to aid in the execution of the laws in and around Wounded Knee: SFC Mark M. Gaddis, SSGT James P. Murphy, SFC James L. Myers, Thomas N. Sladek, MSG Verner R. Roberts, SP5 Max S. Smith, Edward C. Binder, Laurence G. Lade, CW4 Dale M.

Brunick, SGT Dolan S. Olson, SGT David A. Saunders, SP5 David J. Smith, S/SGT Bruce C. Peterson, MSG Emanual J. Torres, Maj. George F. Drew, CPT Thomas D. Brown, and Col. Robert D. Chalberg;

(e) On or about March 2, 1973, used a United States Air Force aircraft with a crew of regular Air Force officers to fly from Pope Air Force Base to Offutt Air Force Base and to Ellsworth Air Force Base for Defendant Warner, for the purpose of executing the laws in and around the Village of Wounded Knee;

(f) On or about March 3, 1973, used a United States Air Force aircraft with a crew of regular Air Force officers to fly Defendants Erickson and Colburn from Washington, D.C., to Ellsworth Air Force Base, for the purpose of executing the laws in and around the Village of Wounded Knee;

(g) On or about March 16, 1973, used a United States Air Force aircraft with a crew of regular Air Force officers to fly Defendant Wood from Andrews Air Force Base to Ellsworth Air Force Base for the purpose of executing the laws in and around the Village of Wounded Knee;

(h) On or about March 19, 1973, used a United States Air Force aircraft with a crew of regular Air Force Officers to fly twenty-five United States Marshals from Andrews Air Force Base to Ellsworth Air Force Base for the purpose of executing the laws in and around the Village of Wounded Knee.

Intelligence Activities.

34. During the period February 26 to May 12, 1973, Defendants Buzhardt, Belieu, Edwards, and Gleszer, each acting in Washington, D.C., and other Defendants acting in Washington, D.C., and elsewhere, used personnel and other resources constituting parts of the United States

Army or Air Force (to inquire into, collect intelligence about, keep records of, and render advice concerning, the execution of the laws in and around the Village of Wounded Knee.)

Specific Plans For Use of Federal Military Force.

35. (a) On or about March 8, 1973, Defendants Kleindienst and Sneed acting in Washington, D.C., and other Defendants requested of the Department of Defense sufficient personnel from the Army or Air Force to establish a twenty-five mile perimeter around Wounded Knee to aid in executing the laws.

(b) Pursuant to that request, Defendants Gleszer and Edwards acting in Washington, D.C., prepared an "operational concept" for operations at Wounded Knee, calling for a thousand-man task force from the eighty-second Airborne Division to assist in executing the laws in and around Wounded Knee.

(c) The operational concept was forwarded to Defendant Haig in Washington, D.C., and was approved by him in Washington, D.C.

36. (a) On and prior to March 13, 1973, Defendants in Washington, D.C., used personnel in the Directorate of Military Support in Washington, D.C. to prepare plans and optional plans for deployment of federal military forces to execute the laws in and around the Village of Wounded Knee.

(b) Those plans were submitted to Defendant Belieu in Washington, D.C., and by him were there submitted for approval to the Secretary of Defense.

37. On or about March 30, 1973, and until about April 2, 1973, Defendant Warner and LTC Sapp of the Directorate of Military Support met at Fort Bragg to develop "close hold contingency plans" providing for the use of parts of the United States Army or Air Force to execute the laws in and around Wounded Knee.

38. On or about May 3, 1973, Defendants Warner and Colburn spent several hours conferring and laying plans for the taking of aggressive action against a position occupied by Indians in or around the Village of Wounded Knee.

Miscellaneous Military Equipment Used.

39. (a) In addition to the armored personnel carriers and aircraft heretofore described, and the vehicles to be described in the paragraphs which follow, at various times during March and April, 1973, Defendants acting in Washington, D.C., and other Defendants pursuant to orders and instructions issued by the Defendants acting in Washington, D.C., used trucks and sedans, constituting parts of the United States Army or Air Force, and operated by drivers who were members of the United States Army or Air Force, to carry military persons and military equipment from Fort Carson to the Pine Ridge Indian Reservation for the purpose of executing the laws in and around the Village of Wounded Knee.

(b) Such trucks were used for at least two round trips, and such sedans were used for at least ten round trips.

(c) The cost of such trips was paid by the United States Department of Justice.

40. The following firearms and ammunition, constituting parts of the United States Army or Air Force, were used by Defendants acting in Washington. D.C. and by Defendants pursuant to orders and instructions issued by the Defendants acting in Washington, D.C. to execute the laws in and around the Village of Wounded Knee:

From Fort Carson:

44,200 rounds M-16 ammunition
18,760 rounds M-16 tracer ammunition
5,000 rounds M-1 ball ammunition
3,000 rounds M-1 tracer ammunition
20 magazines, M-14

From Fort Ord:
18,200 rounds M-1 ball ammunition
From Ellsworth Air Force Base:
50,000 rounds M-16 ammunition
Through South Dakota National Guard:
137 M-16 rifles
20 sniper rifles, M1-D1
35,800 rounds M-16 ammunition
2,000 rounds M-1 ball ammunition
Through Nebraska National Guard:
20 rifles, M-1
4,000 rounds M-1 ball ammunition
Through Minnesota National Guard:
3,000 rounds M-1 ball ammunition
3,000 rounds M-1 tracer ammunition
Through Michigan National Guard:
3,000 rounds .30 cal. ball ammunition
Total:
177 rifles
189,960 rounds of ammunition

41. The following miscellaneous items of military equipment, constituting parts of the United States Army or Air Force, were used by Defendants acting in Washington, D.C. and by other Defendants pursuant to orders and instructions issued by the Defendants acting in Washington, D.C. to enforce the laws in and around the Village of Wounded Knee:

From Fort Carson:
21,850 star parachute flares
300 trip flares, M-49
12 CS launchers, E8
12 grenade launchers, M-79
600 40mm CS grenades
600 cartridges, 40mm HC
2 mine detectors
2 backpack radios

15 TA-312 telephones
2 telephones w/amplifier, battery operated
2 SB-22 switchboards
4 reels, field wire dispensing
4 MX/306/AG wire (½ mile)
23 miles wire, field, on one mile reels
6 ¼ ton trucks
1 400 gal. water trailer
30 5 gal. water cans
30 5 gal. gas cans
12 fire extinguishers
200 sandbags
100 rations, combat/per day
100 helmets, with liners
200 ponchos
100 pile caps
180 parkas
200 masks, protective
100 M-16 ammunition pouches
130 arctic boots
150 canteens w/cup and cover
100 blankets
20 air mattresses
20 folding cots
14 general purpose tents (small)
47 stoves
From Tooele Army Depot:
950 star parachute flares
From Ellsworth Air Force Base:
50 parkas
3,000 in-flight rations
Through South Dakota National Guard:
3 trucks, 5T w/lowboy
9 trucks, ¼ ton
2 trucks, 2½ tons, w/winch

4 trucks, ¼ ton, with mounted Xenon searchlight
30 cans, water
30 cans, gas
15 spouts, flexible
13 protective masks
45 helmets
195 protective vests
75 pile caps
230 mittens w/trigger finger

Through Nebraska National Guard:

1 5T truck w/two 600 gal. fuel pods
50 protective masks

Through Minnesota National Guard:

150 first aid packets

42. (a) The cost of the United States Army and Air Force personnel and equipment used to enforce the law in and around the Village of Wounded Knee, excluding the cost of full time regular Army officers and full time regular Air Force Officers who were so used, amounted to a total in excess of $289,420.

(b) The latter sum was paid by the Department of Justice to the Department of Defense in reimbursement of such costs.

Prepositioning of Personnel and Equipment.

43.(a) On or about April 13, 1973, acting in Washington, D.C., Defendant Kleindienst or Defendant Sneed or other Defendants requested the Department of Defense to provide a "prepositioned package" of military personnel and equipment for contingency use to execute the laws in and around the Village of Wounded Knee.

(b) Defendant Edwards and Defendant Haig and Defendant Belieu, each acting in Washington, D.C., on or about April 17, 1973, did preposition at Fort Carson, in response to that request, a significant amount of equipment and munitions as well as personnel of the regular United States Army or Air Force, ready to be shipped to the vicinity of Wounded Knee on order of Defendant Edwards.

(c) On or about April 23, 1973, the prepositioned package at Fort Carson was placed on a six-hour alert by order of a Defendant acting in Washington, D.C.

(d) The prepositioned package included:

A. Personnel:

Medical detachment (air ambulance), consisting of: two air ambulance crews (8 persons); and two physicians
Two troop helicopters crews (8 persons)
One chemical training team (4 persons)
One helicopter maintenance team (10 persons)
One ground-air communications team (2 persons)
One logistics team (7 persons)

B. Equipment:

4 each, M79 grenade launcher
100 rounds, 40mm high explosive ammunition for M79
100 rounds, 40mm smoke ammunition for M79
500 rounds, 40mm CS ammunition for M79
20 cases, M25A2 CS grenade (baseball)
750 pounds, Powder, Chemical, CS1 flash crystals
40 each, CS cannisters, E158R2
6 each, Dispersers, M5, riot control agent, w/installation kits for mounting on armored personnel carriers or helicopters
6 each, smoke generators

1 each, loud speaker, helicopter mountable
4 each, telephone, TA312/PT
2 miles, wire, WD-1
2 each, helicopter, UH1 (troop lift)
2 each, helicopter, medevac

Concealment and Coverup.

44. Defendant Warner and other members of the United States Army or Air Force who were present at or near Wounded Knee to aid in executing the laws were ordered by one or more Defendants acting in Washington, D.C., to wear, and did wear, civilian clothing so as to disguise their military character.

45. Defendant Sneed and other Defendants, acting in Washington, D.C., wilfully failed to disclose complete information revealing the full extent of federal military involvement in the execution of the laws in and around Wounded Knee, when such information was requested by the United States Senate Committee on Interior and Insular Affairs during that Committee's investigation in March, April, and May of 1973.

46. Defendants have in other ways attempted to conceal or to withhold from disclosure complete and accurate information about the manner and extent of their use of parts of the United States Army or Air Force to execute the laws in and around the Village of Wounded Knee.

Scienter.

47. Each Defendant knew, or should have known, that his use of, and their conspiracy to use, part or parts of the United States Army or Air Force to execute the laws in and around the Village of Wounded Knee was unlawful, and violated the statutory and constitutional rights of Plaintiffs and other persons.

48. In acting as alleged in this Complaint, each Defendant knew that the persons present in the Village of Wounded Knee during the time material to this Complaint posed no threat of bodily harm to any person, and posed no threat to the Nation, the State of South Dakota, or the Pine Ridge Reservation itself; and each Defendant acted as alleged, willfully, wantonly, and in bad faith, and because the situation at Wounded Knee was viewed by him as a source of irritation and embarrassment to the Administration of then President Nixon in general and to the Department of Justice in particular.

VII.

INJURIES TO PLAINTIFFS

49. As a direct and proximate result of the actions of the Defendants and each of them, each Plaintiff suffered and sustained loss and damage in one or more or all of the following respects:

(a) Each Plaintiff was deprived of his or her liberty, freedom of movement, right to travel, right of assembly, right to petition the government for redress of grievances, right to the free exercise of religion, right to privacy, right to be free from unreasonable search, surveillance, seizure, and imprisonment, right not to have military personnel or other military resources employed or utilized against them, and other rights secured to them by the laws and Constitution of the United States.

(b) The Plaintiffs were injured in their persons, and deprived of food, medicine, medical care and the necessities of life.

(c) The Plaintiffs' properties were confiscated, stolen, destroyed, ransacked, looted and pillaged.

(d) The Plaintiffs were variously held, detained, arrested, jailed, incarcerated, forced to appear before

judicial bodies, forced to defend themselves, forced to appear and travel to various places throughout the United States for judicial appearances and hearings, and forced to incur costs and expenses in connection therewith.

(e) The Plaintiffs were deprived of the right of free association, communication, consortium, assistance and comfort of family, friends and associates.

(f) The Plaintiffs were deprived of jobs, employment, monies, and financial assistance and benefits to which they were entitled.

(g) The Plaintiffs were subjected to illegal searches and seizures of their persons, automobiles, homes and personal effects.

(h) Plaintiff Agnes Lamont suffered the death of her only son, Lawrence Lamont, with resultant loss of his society, support, love, comfort, advice and assistance.

(i) Each Plaintiff suffered great pain in mind and body, humiliation, discomfort, aggravation, assaults and brutality.

(j) The Plaintiffs were in other ways not herein specifically set forth, damaged and injured in their minds, persons, bodies and property.

VIII.

RELIEF DEMANDED

WHEREFORE, Plaintiffs pray for judgment against all of the Defendants jointly and severally, as follows: for compensatory damages, as to each of the fifteen Plaintiffs, an amount in excess of ten thousand dollars ($10,000) to be proved at trial; and for punitive damages,

the amount of six million dollars ($6,000,000); and also the costs and disbursements of this action, including reasonable attorneys' fees.

Original Complaint filed
February 27, 1975.
Amended Complaint dated
February 6, 1979.

/s/ DAVID E. ENGDAHL

DAVID ENGDAHL, Esq.
Engdahl, Renzo & Reed, P.C.
Suite 301, Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
(303) 571-0852

KENNETH E. TILSEN, Esq.
400 Minnesota Building
St. Paul, Minnesota 55101
(612) 224-7687

TERRANCE A. SIDLEY, Esq.
117 N. Fairfax Street
Alexandria, Virginia 22714
(703) 549-4404

Attorneys for Plaintiffs

Supreme Court of the United States

No. 86-987

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL.

ORDER ALLOWING CERTIORARI. *Filed February 23, 1987.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit*, is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 181-483:40510

PETITIONER'S

BRIEF

No. 86-987

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

BARBARA L. HERWIG
MARC JOHNSTON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the violation of a federal statute, without more, may render unreasonable an otherwise reasonable seizure and thereby give rise to a Fourth Amendment claim under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

2. Whether a purported violation of the Posse Comitatus Act, 18 U.S.C. 1385, without more, gives rise to a Fourth Amendment claim under *Bivens*.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-14a) is reported at 800 F.2d 812. The opinion of the panel (Pet. App. 15a-33a) is reported at 776 F.2d 1384. The opinion of the district court dismissing the complaint (Pet. App. 34a-38a) is unreported. An earlier opinion of the district court (Pet. App. 39a-58a) is reported at 539 F. Supp. 552.

JURISDICTION

The judgment of the court of appeals en banc (Pet. App. 59a) was entered on September 16, 1986. The petition for a writ of certiorari was filed on December 15, 1986, and was granted on February 23, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated • • •.

The Posse Comitatus Act, 18 U.S.C. 1385, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

STATEMENT

1. On February 27, 1973, an armed group of Indians occupied the village of Wounded Knee, South Dakota, on the Pine Ridge Reservation. Shortly after the occupation began, members of the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Indian Affairs Police sealed off the village by establishing roadblocks at all major entry and exit roads. The standoff between the Indians and law enforcement authorities ended about ten weeks later with the surrender of the Indians occupying the village. Pet. App. 16a.

2. In February 1975, respondents, most of whom were residents of the Pine Ridge Reservation at the time of the occupation, brought this action in the District Court for the District of Columbia. Respondents alleged that petitioners, who were at that time military personnel or federal officials, had conspired to seize and assault them and to destroy their property, in violation of several constitutional and statutory provisions. Respondents' principal claim was that petitioners' use of military personnel to assist the law enforcement efforts at Wounded Knee violated the Posse Comitatus Act, 18 U.S.C. 1385, as well as a purported constitutional right—arising from that statute—to be free from the use of the military in the enforcement of civil laws. Pet. App. 17a, 40a-41a; J.A. 23-24, 34-51.

In 1981, after the case was transferred to the District of South Dakota, petitioners moved to dismiss the complaint. They contended that respondents had failed to state a claim, that there was a lack of personal jurisdiction, and that the allegations in the complaint were vague and conclusory. On May 24, 1982, the district court granted the motion to dismiss in part, permitting respondents leave to file an amended complaint (Pet. App. 39a-58a). The court held, first, that all but one of the named defendants had been improperly served with process (*id.* at 41a-50a). Next, the court determined that respondents had failed to state a claim under 18 U.S.C. 2, 241, and 371, and under the Posse Comitatus Act, 18 U.S.C. 1385, on which respondents had "place[d] their primary reliance" (Pet. App. 51a-53a). The court could not locate "the slightest indication of any legislative intent to create a private cause of action" under these statutes (*id.* at 51a-52a).[1] Finally, the

[1] As to the claims under 18 U.S.C. 241 and 371, the district court cited authority rejecting assertions of a civil damage remedy. *E.g.*, *Fiorino* v. *Turner*, 476 F. Supp. 962, 963 (D. Mass. 1979). The court said it had found no such direct authority concerning the question of a private right of action under 18 U.S.C. 2 and 1385.

court rejected respondents' "central" claim (*id.* at 53a) to a constitutional "right to be free of the use of the military in the enforcement of civil laws" (*id.* at 53a-57a). The court held that "the mere enforcement of the law by officials who happen to be members of the military and involving no infringement of a citizen's recognized constitutional rights, does not present a constitutional violation giving rise to a private cause of action" (*id.* at 56a n.7). Because the respondents had alleged other violations of their rights under the First, Fourth and Fifth Amendments—such as violations of their freedom of movement, right to travel, and right of assembly—the court did not dismiss the complaint in full (*id.* at 56a). Instead, in light of the vagueness of the complaint (*id.* at 57a-58a), the court granted respondents leave to file an amended complaint within 40 days.

On July 20, 1982, respondents filed their second amended complaint. See J.A. 1-20. In it, respondents again alleged—as their only claim for relief—that petitioners had violated the Constitution by using the military in contravention of the Posse Comitatus Act (Pet. App. 35a; J.A. 3-12). On October 18, 1984, the district court again dismissed the complaint (Pet. App. 34a-38a), holding that it could not "accept the proposition that, because Congress has chosen to put statutory limits on the actions of government officials, any act that goes beyond these limits is thereby an automatic violation of the Constitution" (*id.* at 37a). The court observed that "[j]ust as a state may impose greater restrictions on police activity than that required under the Constitution, so may Congress also impose greater restrictions on the ability of the federal government to enforce laws than are imposed on those officials by the Constitution itself" (*ibid.*). Since "the Constitution itself does not prohibit the use of the military in civil law enforcement," and since Congress—while limiting the role of the military in civilian life under 18 U.S.C. 1385—did not create "a private cause of action for violations of that statute," then "even assuming defendants were all guilty of § 1385 violations, this fact provides no basis for [respondents'] claim" (Pet. App. 37a-38a).

3. The court of appeals reversed (Pet. App. 15a-33a). The court framed the issue as "whether a search or seizure, otherwise permissible, can be rendered unreasonable under the Fourth Amendment because military personnel or equipment were used to accomplish those actions" (*id.* at 19a). In resolving this question, the court held, "the limits established by Congress on the use of the military for civilian law enforcement provide a reliable guidepost by which to evaluate the reasonableness for Fourth Amendment purposes of the seizures and searches" (*id.* at 24a). In particular, the court stated, "[respondents'] Fourth Amendment case * * * must stand or fall on the proposition that military activity in connection with the occupation of Wounded Knee violated the Posse Comitatus Act" (*id.* at 26a). That Act, the court surmised (*id.* at 25a-26a), is "not just any act of Congress" but is instead "the embodiment of a long tradition of suspicion and hostility towards the use of military force for domestic purposes."

Relying on its previous decision in *United States* v. *Casper*, 541 F.2d 1275 (1976) (per curiam), cert. denied, 430 U.S. 970 (1977), the court stated (Pet. App. 26a) that the Act was not violated by the alleged use of military personnel, planes and cameras for aerial surveillance; by reliance on military ad-

vice in dealing with the disorder; and by the furnishing of military equipment and supplies.[2] The court held, however, that respondents' allegations went beyond these limits, and included the purported involvement of military personnel in "'maintain-[ing] roadblocks and armed patrols constituting an armed perimeter around the village of Wounded Knee'" (*id.* at 29a). To that extent, the court concluded, respondents' allegations stated a violation of the Posse Comitatus Act and thus gave rise to a Fourth Amendment claim sufficient "to survive a motion to dismiss" (*ibid.*).[3]

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[2] To the extent that respondents based their Fourth Amendment claim on these purported actions by the military, the court upheld the district court's dismissal (Pet. App. 29a-30a). The court of appeals stated (*ibid.*) that "this sort of activity does not violate the Posse Comitatus Act * * * [and] is therefore not 'unreasonable' for Fourth Amendment purposes."

[3] The court rejected respondents' claims under the Due Process Clause of the Fifth Amendment, finding "no clear support for the novel theory" that there can be a "due-process violation by reason of the mere fact that the confinement and other deprivations inflicted upon [respondents] derived from military action instead of civilian" (Pet. App. 30a). Still, the court noted, it was "reinforced" in its decision to uphold the dismissal of those claims "by the knowledge that all of the proof relevant under such a theory will still come in if and when the Fourth Amendment search-and-seizure theory goes to trial. In other words, [respondents] do not really need the due-process theory in order to secure relief here, the Court having already held that an unauthorized action by a military officer can be 'unreasonable' under the Fourth Amendment even though the same thing, if done by a civilian official, would not." *Id.* at 32a. The court also declined to reach, on the present record, petitioners' claims that they were not properly served and that the action was barred by the statute of limitations (*ibid.*).

4. The court of appeals thereafter granted petitioners' application for rehearing en banc (see 788 F.2d 494 (1986)), but after supplemental briefing and argument the court divided 5-4 in upholding the panel's decision (Pet. App. 1a-14a). The majority acknowledged (*id.* at 5a) "that the Constitution is conceptually and practically distinct from any Act of Congress, and [that] it is not the law that any search and seizure that violates a federal statute also violates the Fourth Amendment." The majority nevertheless viewed the Posse Comitatus Act as "a special case" for the reasons stated in "[t]he panel opinion" (*ibid.*). Observing that "Acts of Congress * * * must be at least *prima facie* evidence of what society as a whole regards as reasonable" (*ibid.*), the majority "adhere[d] to the decision[ ] made by the panel, * * * upholding as legally sufficient the Fourth Amendment theory, to the extent that the complaint alleges a violation of the Posse Comitatus Act" (*id.* at 10a).[4]

Judge Fagg, joined by three other judges, dissented (Pet. App. 11a-14a). In his view, the Posse Comitatus Act "should not be the sole threshold consideration in determining whether an unreasonable

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[4] The court also held that on remand petitioners might be able to establish defenses of either absolute or qualified immunity (Pet. App. 3a), or demonstrate that their conduct was exempted by Congress from the reach of the Posse Comitatus Act by other legislation (*id.* at 3a-4a). In addition, the court refused to reconsider the panel's holding that "indirect or passive military involvement, such as aerial surveillance and the furnishing of materials and supplies," does not violate the Posse Comitatus Act and therefore states no Fourth Amendment claim (*id.* at 10a).

seizure in violation of the Fourth Amendment has occurred" (*id.* at 11a). As he put it (*id.* at 11a-12a):

> To accept the court's view renders unnecessary any examination of the circumstances or exigencies giving rise to the actions taken or the scope, nature, or purpose for which the actions were taken. Under the court's analysis, regardless of the lives saved, the property protected, and the otherwise reasonable and responsible actions of military officers seeking to assist civil law enforcement officials, a violation of the Posse Comitatus Act results in all other considerations becoming constitutionally irrelevant and per se constitutes a violation of the Fourth Amendment.

Judge Fagg agreed that "the Posse Comitatus Act rightfully seeks to restrict military involvement in civilian affairs" (*id.* at 12a); but, he added, "[t]he Constitution itself does not prohibit or restrict such involvement" and, in this case, "[petitioners'] actions were reasonable" (*ibid.*). The dissent also noted that "by focusing wholly on the Posse Comitatus Act [the majority] has created a private cause of action not expressly or by implication authorized by Congress" (*id.* at 13a).[5]

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[5] Judge Fagg found it "truly ironic that military officials who responded to requests for assistance by civilian authorities and who in the face of an armed uprising acted not to subvert but to preserve and protect the Constitution and restore civilian rule now face substantial monetary liability" (Pet. App. 13a).

SUMMARY OF ARGUMENT

The court of appeals held that an otherwise reasonable seizure becomes unreasonable simply because it is executed in purported violation of the Posse Comitatus Act. Although recognizing in general that a Fourth Amendment violation does not necessarily result whenever a search or seizure violates a statute, the court found the Posse Comitatus Act to be a special case, embodying "a long tradition of suspicion and hostility towards the use of military force for domestic purposes" (Pet. App. 25a-26a). In thus looking to the Act as "a reliable guidepost" (*id.* at 24a) of reasonableness under the Fourth Amendment, the court of appeals erred both as a matter of constitutional and statutory law.

A. We believe that there is *no* statute whose violation, without more, constitutes a per se violation of the Fourth Amendment. To the contrary, this Court's decisions make clear that an array of circumstances must be considered in assessing the reasonableness of a search or seizure—including the nature and purpose of the action and the exigencies giving rise to it. And while some statutes may *affect* the determination of reasonableness, a statute, like the Posse Comitatus Act, that simply allocates law enforcement responsibility among executive agencies has no bearing at all on the determination of reasonableness.

B. Assuming, *arguendo*, that a bare statutory violation may in some cases make a seizure unreasonable under the Fourth Amendment, the result in this case is unsupportable because the Posse Comitatus Act does not establish standards for reasonable searches and seizures. Indeed, the text of the Act makes a most quixotic source of Fourth Amendment

values; and the legislative history demonstrates that the 1878 Congress that passed the Act did not intend thereby to create any restriction with *constitutional* implications concerning the deployment of the military in law enforcement. While certain provisions in the Constitution, not applicable here, deal quite explicitly with the management and deployment of the armed forces, the Fourth Amendment, relied on by respondents, does not. And given the historical record, there is no reason to suppose that the Framers intended the Fourth Amendment to incorporate a set of additional constraints on the use of military force, not articulated in the Amendment itself.

ARGUMENT

A SEIZURE IS NOT UNREASONABLE UNDER THE FOURTH AMENDMENT SIMPLY BECAUSE IT IS MADE IN VIOLATION OF THE POSSE COMITATUS ACT

A. As A General Matter, The Violation Of A Statute, Without More, Does Not Make A Seizure Unreasonable

1. This Court has consistently made clear that "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)). The Court has stressed that a "'balancing of competing interests'" is "'the key principle of the Fourth Amendment'" (*Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981) (citation omitted)), and that "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the

justification for initiating it, and the place in which it is conducted" (*Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)). And in making these balancing judgments, courts cannot resort to "any fixed formula" or "litmus-paper test" (*United States* v. *Rabinowitz*, 339 U.S. 56, 63 (1950); see also *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931)).

2. The court of appeals applied just such a "fixed formula" in ruling that if the involvement of the military at Wounded Knee could be said to have violated the Posse Comitatus Act, then the purported seizure of respondents was necessarily unreasonable under the Fourth Amendment. More specifically, the court of appeals ignored this Court's decisions holding that the content of the Fourth Amendment cannot be determined simply by rote incorporation of statutory provisions.

The Court has repeatedly rejected the contention that a Fourth Amendment claim may be predicated, without more, upon some alleged statutory violation. In *Cooper* v. *California*, 386 U.S. 58 (1967), for example, the lower court had suppressed the evidence seized by police officers from a defendant's car after they had impounded the car following the defendant's arrest, reasoning that the officers had no authority under the state forfeiture statute to conduct the search. This Court rejected that conclusion, in language equally applicable to the holding of the court of appeals in this case (386 U.S. at 61):

> [T]he question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not

expressly authorized by state law be justified as a constitutionally reasonable one.[6]

The Court in *Oliver* v. *United States*, 466 U.S. 170 (1984), likewise refused to accept a claim to a "reasonable expectation of privacy" under the Fourth Amendment based solely on the putative violation of statutory law. The Court in that case held that trespass laws could not create a Fourth Amendment privacy interest in so-called "open fields." Trespass laws, the Court held, are not designed to protect the same interests as the Fourth Amendment. As the Court put it (466 U.S. at 183 n.15):

> [T]he common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title.

Similarly, in *Dow Chemical Co.* v. *United States*, No. 84-1259 (May 19, 1986), rejecting a Fourth Amendment claim asserted by the plaintiff, the Court held that trade secret law, as well as state tort law governing unfair competition, "does not define the limits of the Fourth Amendment" (slip op. 4). See also *New Jersey* v. *T.L.O.*, 469 U.S. 325, 343 n.10 (1985); *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S.

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[6] Accord, *Sibron* v. *New York*, 392 U.S. 40, 59-62 (1968).

388, 393-394 & n.6 (1971); *Silverman* v. *United States*, 365 U.S. 505, 511 (1961).[7]

Just as the Court has refused to uphold Fourth Amendment claims solely derived from statutory violations, so too has it rejected arguments that mere compliance with governing statutes obviates a more probing Fourth Amendment inquiry. This Court's decision in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), illustrates how a statute may fall short of the constitutional mark and thus furnish an insufficient standard for Fourth Amendment "reasonableness." In that case the Court held that warrantless inspections of business premises under Section 8(a) of the Occupational Safety and Health Act of 1970 violated the Fourth Amendment. The Court rejected the contention that the statute should be upheld because it "represents a congressional construction of the Fourth Amendment" (436 U.S. at 311). Instead, the Court considered the historical purposes of the Warrant Clause, together with the "specific enforcement needs and privacy guarantees" of the statute (*id.* at 311-324). The simple fact that a statute authorized the search did not ensure that the search was constitutional.

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[7] The simple violation of an agency regulation likewise has been held not to give rise to a constitutional claim. In *United States* v. *Caceres*, 440 U.S. 741 (1979), the defendant sought to suppress certain tape-recorded conversations between an I.R.S. agent and himself that were offered at his bribery trial. Defendant contended that the agent had failed to secure authority to record the conversations, thus violating agency regulations. This Court reversed an order suppressing the evidence, holding that "none of respondent's constitutional rights has been violated" (440 U.S. at 755), and that application of the exclusionary rule in this context might well "have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures" (*id.* at 755-756).

More recently, in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the Court refused to uphold under the Fourth Amendment the use of deadly force to effect the arrest of a fleeing felon. There again, a statute authorized the seizing officer to use deadly force in making the arrest. The Court nevertheless "balanc[ed] the extent of the intrusion against the need for it" (471 U.S. at 7), holding that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so" (*id.* at 11). See *Michigan* v. *DeFillippo*, 443 U.S. 31, 39 (1979); *Torres* v. *Puerto Rico*, 442 U.S. 465, 471-472 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 877-878, 883-884 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973) ("no Act of Congress can authorize a violation of the Constitution"); *Berger* v. *New York*, 388 U.S. 41, 44 (1967). Cf. *Illinois* v. *Krull*, No. 85-608 (Mar. 9, 1987), slip op. 14-15 n.12.

The approach of the court of appeals, in finding a statutory provision to be a suitable proxy for the Fourth Amendment, is thus fundamentally in conflict with this Court's jurisprudence. Statutes are enacted for many reasons, and it cannot be assumed that they are intended faithfully to mirror the commandment of a particular constitutional amendment. See 31-39, *infra*. And even when the legislature actually intends to provide guidance in the interpretation of the Constitution—absent a formal amendment through the Article V process—its views can only be one factor in the analysis under the Fourth Amendment. See 15-17, *infra*. If the law were otherwise, the content of constitutional provisions—and thus the extent of constitutional protections—could vary widely

from year to year, depending solely on the legislation that Congress decided to enact. Such vagaries do little to ensure that under the Fourth Amendment "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures" (*Katz* v. *United States*, 389 U.S. 347, 359 (1967)).[8]

3. While a statute may not—contrary to the mistaken assumption of the court of appeals in this case—supplant a thoroughgoing Fourth Amendment analysis, some statutes clearly can and do have implications for the balancing of competing interests. For example, statutes may affect a person's expectation of privacy and thus bear on whether or not he has any Fourth Amendment rights at all. See *Katz* v. *United States*, 389 U.S. at 360 (Harlan, J., concurring). In this connection, the Court has recognized an exception from the Warrant Clause for "pervasively regulated business[es]" (*United States* v. *Biswell*, 406 U.S. 311, 316 (1972)), and for "closely regulated" industries "long subject to close supervision and inspection" (*Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 74, 77 (1970)), on the grounds that such ongoing statutory regulation diminishes "justifiable expectations of privacy" (*Biswell*, 406 U.S. at 316). See also *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981). The Court has also held that

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[8] Measuring the content of the Fourth Amendment solely by the terms of a statute leads to the further anomaly that even where the statute creates no private right of action for a violation, the Fourth Amendment will automatically provide one. The latter anomaly is especially striking in this case, since respondents have expressly renounced the claim that there is a private right of action under the Posse Comitatus Act. See Pet. App. 17a & n.3.

"pervasive and continuing governmental regulation and controls" may reduce the expectation of privacy of an automobile operator (*South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976); see also *New York* v. *Class*, No. 84-1181 (Feb. 25, 1986), slip op. 6-7; *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973)), and may likewise diminish a government employee's expectation of privacy in the workplace (see *O'Connor* v. *Ortega*, No. 85-530 (Mar. 31, 1987), slip op. 6).*

The Court has also relied on statutes as evidence of what society regards as a reasonable intrusion on individual privacy. In *Donovan* v. *Dewey*, 452 U.S. 594 (1981), for example, the Court rejected a Fourth Amendment challenge to the warrantless search provisions of the Federal Mine Safety and Health Act of 1977. The Court concluded (452 U.S. at 602) that Congress had found "a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines" and had "reasonably determined that warrantless searches are necessary to further a regulatory scheme" (*id.* at 600). Similarly, in *United States* v. *Watson*, 423 U.S. 411 (1976), the Court relied, in part, on a federal statute when it upheld the authority of postal inspectors to make warrantless arrests of felony suspects. See also *Tennessee* v. *Garner*, 471 U.S. at 15-16 ("look[ing] to prevailing rules in individual jurisdictions" in assessing the reasonableness of police procedures). In each of these cases, however, the Court examined the competing interests of the government

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* Cf. *Illinois* v. *Krull*, No. 85-608 (Mar. 9, 1987) (The exclusionary rule does not apply to police officers who act in reasonable reliance upon a statute authorizing warrantless administrative searches).

and the individual, and treated the statutes in question as evidence that informed, but was not dispositive of, the requisite Fourth Amendment balancing inquiry. See, *e.g.*, *Garner*, 471 U.S. at 9-11; *Dewey*, 452 U.S. at 602-606; *Watson*, 423 U.S. at 416-424.

4. But not every statute that limits the government's freedom to act in a particular fashion may be said to affect a person's expectation of privacy or furnish evidence of what society believes to be a reasonable intrusion. Many such statutes concern matters of internal governmental organization and housekeeping, and can only by the most strained reasoning be said to bear in any way on an individual's expectation of privacy. In particular, when the government does nothing more than allocate law enforcement responsibility among different agencies, the resulting statute, like the Posse Comitatus Act, is simply not relevant to a court's analysis under the Fourth Amendment.

As the Court put it in *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978), "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman * * *." By the same token, no *greater* Fourth Amendment constraints should arise by virtue of the uniform of the seizing official. The strictures of the Fourth Amendment are "imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority'" (*New Jersey* v. *T.L.O.*, 469 U.S. at 335 (quoting *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921)). How the sovereign elects to distribute its law enforcement responsibilities among its various agencies has no bearing on the Fourth Amendment analysis.

As we show in more detail below, pp. 20-39, *infra*, the Posse Comitatus Act does nothing more than confine the deployment of the Army and Air Force in law enforcement to cases in which they have been expressly authorized to participate. Such an allocation of enforcement authority cannot plausibly be said to affect an expectation of privacy "that society is prepared to recognize as 'reasonable'" (*Smith* v. *Maryland*, 442 U.S. 735, 740 (1979), quoting *Katz* v. *United States*, 389 U.S. at 353, 361; see also *Hudson* v. *Palmer*, 468 U.S. 517, 525 (1984)). Nor does such an allocation decision reflect a legislative judgment that the execution of the law by some other official is unreasonable under the Fourth Amendment. The government allocates enforcement responsibilities for any number of reasons, including manpower needs, experience, and logistics.[10] Deviations from those allocations are not "unreasonable" under the Fourth Amendment; they may, in fact, be nothing more than inefficient.[11]

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[10] To be sure, the government may sometimes allocate law enforcement responsibility because of a view of the "propriety or desirability, from a policy standpoint," of assigning a given role to a particular agency (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). The Posse Comitatus Act, for one, may arguably reflect such policy concerns. But a legislative judgment about what "policies" are most "desirable" in parcelling out the government's functions must not be confused with the *constitutional* judgment about what limits should be imposed on government actions. The court of appeals indulged precisely that confusion in elevating the policy judgments embodied in the Posse Comitatus Act to the stature of constitutional doctrine.

[11] The court of appeals is not alone in ignoring the fact that the Fourth Amendment is addressed to the reasonableness of *searches*, and not the identity of *searchers*. In a series of

B. In Any Event, A Purported Violation Of The Posse Comitatus Act, Without More, Does Not Give Rise To A Fourth Amendment Claim Under *Bivens*

Even if the violation of certain statutes could, in some cases, render a seizure unreasonable under the Fourth Amendment, the Posse Comitatus Act is not such a statute.[12] The language and structure of the

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analogous cases, the Ninth Circuit has held that the use of Department of Commerce agents (*United States* v. *Whiting*, 781 F.2d 692 (1986)), or agents of the F.B.I. (*United States* v. *Soto-Soto*, 598 F.2d 545, 550 (1979)), in executing border searches makes those searches unreasonable under the Fourth Amendment. None of those cases explains why the government's decision to assign border search responsibility to Customs—rather than to Commerce or the F.B.I.—makes a search conducted by those other agencies necessarily unreasonable.

[12] The court of appeals' reliance on the Posse Comitatus Act is at odds with decisions of the other circuits, which have uniformly rejected analogous claims in the context of criminal prosecutions. See, *e.g.*, *United States* v. *Griley*, No. 85-5551 (4th Cir. Mar. 26, 1987), slip op. 19-21; *United States* v. *Hartley*, 796 F.2d 112, 114-115 (5th Cir. 1986); *United States* v. *Roberts*, 779 F.2d 565, 566-568 (9th Cir. 1986), cert. denied, No. 85-7057 (Oct. 6, 1986); *United States* v. *Hartley*, 678 F.2d 961, 977-978 (11th Cir. 1982), certs. denied, 459 U.S. 1170 and 459 U.S. 1183 (1983); *United States* v. *Wolffs*, 594 F.2d 77, 84-85 (5th Cir. 1979); *United States* v. *Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974). The state courts have likewise roundly rejected claims under the Act. See, *e.g.*, *People* v. *Hayes*, 144 Ill. App. 3d 696, 98 Ill. Dec. 911, 494 N.E.2d 1238, 1240-1241 (1986); *State* v. *Nelson*, 298 N.C. 573, 584-585, 260 S.E.2d 629, 639 (1979); *State* v. *Danko*, 219 Kan. 490, 497-498, 548 P.2d 819, 825 (1976) (the Posse Comitatus Act "expresses a policy that is for the benefit of the people as a whole, rather than a policy which could be charac-

Act and its interaction with related provisions make the Act a most unlikely, and highly erratic, source of constitutional values. Moreover, the legislative history does not support the court of appeals' belief that the Act reflects a "tradition of suspicion and hostility towards the use of military force for domestic purposes" (Pet. App. 25a-26a). Finally, there is no support for the court's unarticulated premise that the Fourth Amendment incorporates unique restrictions on the use of the military in domestic law enforcement.

1. *The Text And Structure Of The Posse Comitatus Act Demonstrate That The Act Was Not Designed To Furnish A Standard Of Reasonableness Under The Fourth Amendment*

a. The Posse Comitatus Act forbids persons from "willfully us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute

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terized as designed to protect the personal rights of individual citizens as declared in the Fourth Amendment").

Even in the one case that we know of in which evidence was ultimately suppressed under the Posse Comitatus Act, the court made clear that "the potential abuses of the Act obviously are not of the same magnitude, neither qualitatively nor quantitatively, as violations under the Fourth Amendment," and held that "[v]iolations of Section 1385 do not necessitate an automatic invocation of an exclusionary rule." *Taylor* v. *State*, 645 P.2d 522, 524 (Okla. Crim. App. 1982). See also *Harker* v. *State*, 663 P.2d 932, 934-935 (Alaska 1983) (holding that exclusion might be appropriate under a state rule of evidence, as opposed to on constitutional grounds, but declining to decide question because Posse Comitatus Act was not violated). See generally Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 Geo. Wash. L. Rev. 403 (1986); Note, *The Posse Comitatus Act as an Exclusionary Rule: Is The Criminal to Go Free Because the Soldier Has Blundered?*, 61 N. Dak. L. Rev. 107 (1985).

the laws" except "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. 1385.[13] By its terms, the Act does not address the reasonableness of searches and seizures under the Fourth Amendment. The Act simply restricts the use of certain branches of the armed services to "execute the laws." Indeed, it does so in a hit-and-miss fashion, explicitly applying only to the Army and the Air Force. It does not apply to the Coast Guard at all (see *United States* v. *Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982), cert. denied, 459 U.S. 1156 (1983); *Posse Comitatus Act: Hearing on H.R. 3519 Before The Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 48-49 (1981) [hereinafter *Posse Comitatus Hearings*]),[14] and covers the Navy and Marines only "as a matter of [Department of Defense] policy, with such exceptions as may be provided * * * on a case-by-case basis" (32 C.F.R. 213.10(c); see *United States* v. *Walden*, 490 F.2d at 374-375)). Moreover, under the complex array of interlocking statutes and regulations that govern, it appears that the Act does not apply to the National Guard at all.[15]

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[13] The phrase "posse comitatus" is derived from the early common law and refers to the entire population of a county, above the age of 15, from whom the sheriff may draw to aid him in the execution or enforcement of the law. See *Black's Law Dictionary* 1324 (4th ed. 1968). See p. 35, *infra*.

[14] This is true, even though "[t]he Coast Guard * * * is a military service, and an important branch of the armed services" (*United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 10 n.12).

[15] By law, the National Guard is not part of the Army or Air Force except when it has been ordered into active federal

It is hard to fathom how such a statute could possibly supply, as the court of appeals supposed, "a reliable guidepost" of reasonableness within the meaning of the Fourth Amendment. Whether a seizure is reasonable should not depend on whether it is attributed to a soldier or to a Marine. Cf. High, *The Marine Corps and Crowd Control: Training and Experience* in Bayonets in the Streets 113, 132 (R. Higham ed. 1969) (noting that the Marine Corps' "crowd control" and "police work" procedures "are taken from appropriate Army manuals"). Nor can the reasonableness of a search turn on whether the regular Army or a member of the federalized National Guard executes it.

b. Beyond this, the Act does not apply at all to "cases and * * * circumstances" in which the use of the Army or Air Force has been "expressly authorized by * * * Act of Congress"; and that exception confirms that the statute was not designed to provide a reliable benchmark of Fourth Amendment

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service. See 10 U.S.C. 3078, 3079, 3495 (Army National Guard); 10 U.S.C. 8078, 8079, 8495 (Air National Guard). When it is not in federal service, the National Guard is controlled by the states (see *Maryland* v. *United States*, 381 U.S. 41, 46-47 (1965)); and, despite the fact that the Guard's organization, training and equipment are fully coordinated with those of the federal armed forces, the Posse Comitatus Act does not apply (32 C.F.R. 213.10(b)(2)) when states use the Guard as a police force. See generally *Gilligan* v. *Morgan*, 413 U.S. 1 (1973); *Report of the National Advisory Commission on Civil Disorder* 274-279 (1968). On the other hand, whenever the National Guard is called into federal service and thus does become potentially subject to the Posse Comitatus Act (see 10 U.S.C. 3499, 8499), using the Guard to "execute th[e] laws" is expressly authorized by statute (10 U.S.C. 3500, 8500) and, therefore, would not violate the Act.

values.[16] Congress can entirely alter the scope of the Posse Comitatus Act—by either expanding or contracting the number of "express" authorizations for military participation in domestic law enforcement. And only historical accident can explain many of the disparate authorizations that in fact have been made. See generally 32 C.F.R. 213.10(a)(2)(iv) (listing various statutes under which use of the military to execute laws is expressly authorized).

For example, there are a number of statutes authorizing the military to protect certain lands. Thus, Congress has authorized the military to remove trespassers from Indian reservations (25 U.S.C. 180), and to remove unlawful enclosures from public lands

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[16] The further exception from the Posse Comitatus Act for law enforcement activity "expressly authorized by the Constitution" has been a source of considerable ambiguity; and this ambiguity reduces still further the value of the Act as a "reliable guidepost" (Pet. App. 24a) of Fourth Amendment values. Compare *Sterling* v. *Constantin*, 287 U.S. 378, 399 (1932) ("take Care" clause vests discretion to use military force), and *In re Neagle*, 135 U.S. 1, 64 (1890), with *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 644-645 (1952) (Jackson, J., concurring) (Congress has restricted the President's authority to determine whether military force may be used); 41 Op. Att'y Gen. 313, 318-319, 326, 331 (1957) (there is constitutional authority to use military force that may not be restricted by Congress) with 9 Op. Att'y Gen. 516, 518-519 (1860) (military force may only be used in the manner prescribed by Congress); H.R. Conf. Rep. 97-311, 97th Cong., 1st Sess. 121 (1981) (there is inherent authority to use military force to protect federal property) with H.R. Rep. 97-71, 97th Cong., 1st Sess. Pt. 2, at 6 n.3 (1981) (there are no constitutional exceptions to the Posse Comitatus Act); see also Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 Yale L.J. 130, 132-137 (1973).

(43 U.S.C. 1065). It has also authorized the use of military force to protect the rights of discoverers of guano islands (48 U.S.C. 1418), and has likewise extended the "anachronis[tic]" (Note, *supra*, 83 Yale L.J. at 138 n.60) authority to employ military force to protect isolated parcels of federal property (see 16 U.S.C. 593 (authorizing the use of military force to protect federal timber lands in Florida); 16 U.S.C. 23 and 78 (authorizing the use of the Army to remove trespassers from certain specified national parks)).[17]

In addition to such specific statutory authorizations, in 10 U.S.C. 331-334 Congress has provided a more "sweeping authority to quell domestic insurrection through employment of Federal troops." Note, *The* Posse Comitatus *Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 714 n.63 (1976). Under these provisions, military force may be used "[w]henever" a State requests aid "to suppress [an] insurrection" (10 U.S.C. 331); "[w]henever the President considers * * * it impracticable to enforce the laws of the United States * * * by the ordinary course of judicial proceedings" (10 U.S.C.

[17] There is simply no unifying theme in the disparate express authorizations of the use of military force. See, *e.g.*, 16 U.S.C. 1861(a) (enforcement of the Fishery Conservation and Management Act); 22 U.S.C. 408 (preventing illegal arms exports); 42 U.S.C. 97 (enforcing quarantines and health laws affecting vessels in port); 50 U.S.C. 220 (preventing unlawful removal of vessels and cargoes detained under the customs laws). Moreover, it was not until 1982 that the Army's express authority to enforce the laws protecting members of Congress was extended to include the protection of Cabinet officials and Justices of the Supreme Court. See 18 U.S.C. 351, as amended by Pub. L. No. 97-285, §§ 1, 2(a), 96 Stat. 1219.

332); and whenever the President "considers [it] necessary to suppress * * * domestic violence" affecting a "right, privilege, immunity, or protection named in the Constitution and secured by law" or, simply, violence that "opposes or obstructs the execution of the laws of the United States" (10 U.S.C. 333). These provisions, which are derived from statutes enacted at virtually the same time as the Fourth Amendment,[18] essentially authorize the use of the Army whenever the President considers it necessary. Except for the requirement in Section 331 that a State must formally request federal assistance, the only restriction on the President's authority under Sections 331-333 is that "[w]henever the President considers it necessary to use the militia or the armed forces [thereunder], he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time" (10 U.S.C. 334). Because the determination of necessity "belongs exclusively to the [P]resident, and * * * his decision is conclusive upon all other persons" (*Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); see also

[18] 10 U.S.C. 331, 332 and 334 can be traced to the Act of May 2, 1792, ch. 28, §§ 1-3, 1 Stat. 264. That Act established procedures for calling out the militia when federal assistance was requested by a State or when federal laws could not be enforced by the ordinary civil authorities. It was enacted without any suggestion that the Fourth Amendment, then barely a year old, might inhibit such uses of the military. See 3 Annals of Cong. 551-555, 574-580 (1792). The 1792 Act was repealed and reenacted three years later, Act of Feb. 28, 1795, ch. 36, §§ 1-10, 1 Stat. 424-425, at which time Congress removed the requirement that a judge or Congress certify the necessity for using military force. 10 U.S.C. 333, in turn, derives from the Ku Klux Klan Act of 1871, ch. 22, § 3, 17 Stat. 14.

Luther v. *Borden*, 48 U.S. (7 How.) 1, 43-45 (1849)), issuance of a proclamation is ultimately all that distinguishes authorized action from a possibly unauthorized use of military force.

c. Congress revisited the Posse Comitatus Act most recently when, as part of the Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, Tit. IX, § 905, 95 Stat. 1114-1116, it enacted legislation intended to "clarify authority for cooperation between military and civilian law enforcement officials." H.R. Conf. Rep. 97-311, 97th Cong., 1st Sess. 119 (1981). Codified at 10 U.S.C. 371-378, this legislation is the most recent evidence of Congress's unfettered power, and obvious willingness, to alter the reach of the Posse Comitatus Act. Moreover, in enacting this legislation Congress explicitly considered and *rejected* the view—embraced by the court of appeals in this case—that the Posse Comitatus Act embodies a *constitutional* limitation on the use of the military to enforce the law. See generally Note, *supra*, 54 Geo. Wash. L. Rev. at 416-425.[19]

The 1982 legislation has four principal sections. Sections 371 and 372 authorize the Secretary of Defense to make available to federal, state, and local law enforcement agencies information, equipment, and facilities belonging to the military. Section 373 authorizes the Secretary to assign members of the

[19] The court of appeals in this case missed the point when it held (Pet. App. 22a n.8) that the 1982 amendments are irrelevant to the Fourth Amendment analysis because they were not in effect when the seizures at Wounded Knee occurred. While the provisions are not themselves directly applicable to this case, they demonstrate the infinite malleability of the statute, which, on that account, cannot reasonably be read to embody a constitutional standard.

military to train law enforcement officials in the operation and maintenance of equipment furnished under Section 372. Finally, Section 374 authorizes the Secretary, upon two conditions, to assign military personnel to operate equipment that has been furnished under Section 372. First, the equipment must be used "with respect to" violations of certain federal criminal laws (notably, narcotics violations); and second, the equipment must be used only "for monitoring and communicating the movement of air and sea traffic." Beyond this, Section 374 provides that in "emergency circumstances" military personnel may operate the equipment outside the United States "as a base of operations" to enforce the specified criminal statutes, provided that the equipment is not used "to interdict or to interrupt the passage of vessels or aircraft."

Before its enactment, opponents of the proposed legislation made the very argument adopted by the court of appeals in this case—that the bill was at odds with the Posse Comitatus Act and transgressed constitutional limitations on the "role for the military in civilian law enforcement" (H.R. Rep. 97-71, 97th Cong., 1st Sess. Pt. 2, at 18-19 (1981) (Rep. Conyers); see also *Posse Comitatus Hearings* at 34-47 (testimony and statement of Christopher H. Pyle)). Representative Edwards, for example, asserted that "rather important * * * constitutional right[s]" were at stake and opposed the bill because, in his view, it would "profoundly affect the traditional separation of the military from routine civilian law enforcement" (127 Cong. Rec. 15667 (1981)). Representative Bethune argued against "rushing pell-mell to do away with a hundred-year-old rule of law"—the Posse Comitatus Act—which he believed

"might even be in the nature of a constitutional right approximating that of separation of church and state" (*id.* at 15665).[20] And Representative Conyers contended that it would be unconstitutional to restrict the coverage of the Posse Comitatus Act because "to change this 100-year-old law that has admitted constitutional sacredness" would be "tampering with the Constitution" (*id.* at 15682).[21] See also *id.* at 15679 (Rep. Jacobs); *id.* at 15682 (Rep. Chisholm); *id.* at 15687 (Rep. Dellums); *id.* at 15688 (Rep. Gonzalez).

But Congress ultimately rejected the claim that the Posse Comitatus Act has constitutional stature and thus should not be amended. Choosing deliberately to make a "departure from the current strictures" of the Act (H.R. Rep. 97-71, *supra*, Pt. 2, at 12), Congress concluded that the Posse Comitatus Act was a "sufficiently ambiguous" precedent (*id.* at

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[20] Congressman Bethune contended that "[i]n reading some of the court decisions right on up to and including the decisions of the U.S. Supreme Court, I found some very strong language which indicates that many people who have given thoughtful consideration to this issue see the business of posse comitatus and this particular law that we are discussing here today as approximating a constitutional right to keep separate from civilian law enforcement the use of military force, the use of military might" (127 Cong. Rec. 15669 (1981)).

[21] Representative Sawyer later asked Conyers "what article of the Constitution he [wa]s talking about." Conyers replied, "[w]ell, if the gentleman in his years of legal research and wealth of legal experience needs a constitutional citation to figure out whether this is constitutional or not, I am puzzled. Fifty Members have taken the floor and have suggested that there is a constitutional question. Every court case has suggested that there is a potential constitutional infirmity in this whole question of bringing the military into civilian law enforcement" (127 Cong. Rec. 15686 (1981)).

3), whose "age * * * and * * * rather vague legislative history" required clarification (S. Rep. 97-58, 97th Cong., 1st Sess. 148 (1981)).[22] Supporters of the 1982 legislation never doubted that a change in the Posse Comitatus Act would be lawful. As Senator Nunn put it, the "number of other * * * exceptions to the doctrine of posse comitatus" demonstrates that "[w]here the need for military assistance has presented itself with full force, Congress has in the past seen to it that limited assistance has been forthcoming" (*id.* at 2003). Accord, *id.* at 2006 (Sen. Sasser).

In short, while Congress acknowledged a "long tradition of separating the military from day to day involvement in the execution and operation of the civilian laws" (H.R. Rep. 97-71, *supra*, Pt. 2, at 11), the consensus of its members was that "Congress passed [the Posse Comitatus Act]" and could "certainly amend it today to deal with the [drug trafficking] problem" (127 Cong. Rec. 15680 (1981) (Rep. Evans)). As Congressman Sawyer stated (*id.* at 15686), "there is in fact no constitutional problem at all. This is strictly * * * a problem of changing an old law." Congress passed the 1982 legislation—and thus restricted the reach of the Posse Comitatus

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[22] Proponents of the 1982 legislation in the House characterized the Posse Comitatus Act as a source of "confusion" (127 Cong. Rec. 15666 (1981) (Rep. Fish)) and firmly denied that it was intended broadly to enact "some wonderful basic principle [that] * * * the military [is] not to become involved in civilian matters" (*Posse Comitatus Hearings* 4 (testimony of Rep. Bennett)). Senate sponsors termed the Act "a considerable stumbling block to effective surveillance and interdiction of narcotics smugglers" and insisted that effective law enforcement was not possible "without some change in the law or a broader interpretation of posse comitatus" (127 Cong. Rec. 2005 (1981) (Sen. Chiles)).

Act—because it determined that there were good policy reasons to do so.[23] It considered, but rejected, the contention that the Posse Comitatus Act embodies constitutional norms and thus cannot be altered.[24]

2. *The History And Purpose Of The Posse Comitatus Act Confirm That The Act Was Not Intended To Provide A Benchmark Of Reasonableness Under The Fourth Amendment*

The court of appeals' assertion that the Posse Comitatus Act is "the embodiment of a long tradition of suspicion and hostility towards the use of military

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[23] In the course of its deliberations, Congress considered a proposal to give the military the even broader authority to assist federal agents in making arrests and seizures in narcotics cases. See H.R. Rep. 97-71, *supra*, Pt. 1, at 163-164, 203. Although Congress ultimately refused to confer this additional authority, it did so for policy reasons, and not because a majority believed that the Constitution itself prohibited such a broader grant of responsibility to the military. See, *e.g.*, 127 Cong. Rec. 14979 (1981) (Rep. Hughes); *id.* at 14980-14981 (Rep. Dornan); *id.* at 14982 (Rep. White); *id.* at 15659 (Rep. Hughes); *id.* at 15667 (Rep. Fish); *id.* at 15668 (Rep. White); *id.* at 15672 (Rep. McClory); see also H.R. Rep. 97-71, *supra*, Pt. 2, at 11.

[24] "While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980) (citations omitted). See also *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665 n.3 (1985); *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). As we show below, pp. 30-39, *infra*, the precise intent of the Congress that in 1878 enacted the Posse Comitatus Act is far from clear (although plainly it was not to establish a standard of reasonableness under the Fourth Amendment).

force for domestic purposes" (Pet. App. 25a-26a), is not borne out by the history of the Act. The Posse Comitatus Act was not passed to remove the military from law enforcement. Indeed, members of Congress repeatedly acknowledged that the military plays a legitimate role in law enforcement. Congress insisted, however, that the legislature should determine what role the military was to serve, and thus provided that the military could only be deployed in law enforcement when "expressly authorized" by the Constitution or by an act of Congress.

a. The Posse Comitatus Act originated as a rider to an Army appropriations bill, offered during the Forty-fifth Congress on May 20, 1878.[25] In its ini-

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[25] A precursor of the Posse Comitatus Act had been proposed but not enacted during the second session of the Forty-fourth Congress. See Siemer & Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 St. John's L. Rev. 1, 18-24 (1979); Note, *The* Posse Comitatus *Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 704-709 (1976). Responding to perceived misuse of the Army to support "carpetbag" governments during the 1876 elections, the Democratic-controlled House attached a rider to an army appropriations bill designed to prohibit the use of the Army "in support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until such government shall have been duly recognized by Congress." 5 Cong. Rec. 2119, 2152 (1877). After the Republican-controlled Senate refused to agree to the House bill (*id.* at 2156-2162, 2215-2216; see also *id.* at 2241, 2247-2249), President Hayes, newly elected, called a special session of Congress to enact an appropriation for the Army. 6 Cong. Rec. 50 (1877). Because steps to withdraw federal troops from the South had in the meantime been undertaken (see Siemer & Effron, *supra*, 54 St. John's L. Rev. at 20 & n.88), an Army appropriation was passed during the special session without a renewed attempt to attach prohibitions on

tial guise, the rider provided that "it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress." 7 Cong. Rec. 3586 (1878). Supporters defended the proposed amendment on various grounds. In his introductory remarks, Representative Kimmel, the sponsor of the bill, denounced the use of standing armies and stated a preference for state militia. See *id.* at 3579-3586.[26] Other supporters suggested differ-

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domestic use of the military. Act of Nov. 21, 1877, ch. 1, 20 Stat. 1.

[26] Kimmel defended the amendment because he believed that it was constitutionally improper to use the Army to execute the laws—but not, as the court of appeals supposed in the present case, because the Army is a *military* force but rather because it is a *federal* force. See 7 Cong. Rec. 3579-3581, 3583-3584 (1878). Citing "the grouping of the powers conferred on Congress" by Article I, Kimmel drew a line between the "war power" and the power "to execute the laws, suppress insurrections, and repel invasions" (*id.* at 3581). Having drawn this distinction, Kimmel argued (*ibid.*):

> These two powers are as distinct as are the means to be employed for the exercise of them, the Army for defense against external foes, the militia for the suppression of internal resistance, the Army to be created by Congress, because war is a subject of national jurisdiction only; the militia to be created jointly by Congress and the States, because the execution of the laws of the Union and the suppression of insurrections may involve questions of disputed jurisdiction.

Kimmel thereafter confirmed that his objection to the use of the Army in law enforcement lay in its federal—and not military—character. He argued (*id.* at 3583) that it is clear that "not only" did the Framers "not intend that the standing Army * * * should be used for the execution of the laws * * * but * * * also that they did intend that the local militia should

ent rationales. Some voiced general opposition to the use of federal soldiers to enforce Reconstruction (see, *e.g.*, 7 Cong. Rec. 3536 (1878) (Rep. Hewitt); *id.* at 3677-3679 (Rep. Southard)), and, in particular, to using the Army to uphold "carpetbag" governments in South Carolina and Louisiana (see *id.* at 3677-3679 (Rep. Southard); *id.* at 3850 (Rep. Ellis)). Some objected to a recent suggestion of the Secretary of War that the Army was in effect a "national police" force (see *id.* at 3717-3718 (Rep. Ellis)). Still other members debated the propriety of using federal troops to control strike-related violence. Compare, *e.g.*, *id.* at 3538 (Rep. Hewitt); *id.* at 3634 (Rep. Butler); *id.* at 3677 (Rep. Durham); *id.* at 3679 (Rep. Wright); *id.* at 3682-3683 (Rep. Cobb); *id.* at 3735 (Rep. Hardenbergh) with *id.* at 3618 (Rep. Caldwell); *id.* at 3636-3637 (Rep. Garfield).

Kimmel's formulation of the Posse Comitatus amendment, however, did not survive debate on the floor. The House adopted instead a narrower appropriations rider, restricted solely to the deployment of the Army.[27] Proposed by Representative Knott, this rider provided (7 Cong. Rec. 3845 (1878)):

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be the only reliance for the suppression of domestic violence." Kimmel also "demand[ed] * * * that, in obedience to the plain letter of the Constitution, the militia of the country be organized * * * that * * * it may be employed when necessary for the execution of the law" (*ibid.*). Supporters of Kimmel's proposed amendment likewise objected to the use of the Army in domestic disturbances because it was a federal force—not because it involved military force. See, *e.g.*, *id.* at 3538 (Rep. Hewitt); *id.* at 3679 (Rep. Wright); *id.* at 3684 (Rep. Cox).

[27] Indeed, the Air Force was only added to the Act when the military laws of the United States were codified. Pub. L.

> From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by act of Congress.[28]

In contrast to the arguments advanced in support of the Kimmel rider, Knott and his supporters did not view this amendment as an effort to curb the use of federal military force in law enforcement. Indeed, Knott conceded that "the military arm of the Government may be invoked for enforcing the civil laws" (7 Cong. Rec. 3846 (1878)). He observed, moreover, that there were "particular cases in which Congress has provided that the Army may be used, which this bill does not militate against, such as the case of the neutrality laws, the enforcement of the collection of customs duties and of the civil-rights bill, and one or two other instances" (*id.* at 3849).

No. 84-1028, § 18(a), 70A Stat. 626. This addition apparently was based on the savings clause in the National Security Act of 1947, ch. 343, § 305(a), 61 Stat. 508, in which laws applicable to the Army were made applicable to the newly created Air Force. Otherwise, in the 1956 codification the only changes made in the Posse Comitatus Act were "to conform to the style and terminology used in title 18," within which, Congress determined, the Posse Comitatus Act "more properly" belonged. H.R. Rep. 970, 84th Cong., 1st Sess. 727 (1955); S. Rep. 2484, 84th Cong., 2d Sess. 736 (1956).

[28] In addition, Knott's amendment barred use of any of the money appropriated by the 1878 Act "to pay any of the expenses incurred in the employment of any troops in violation" of this provision and established criminal penalties for violation of the Act. 7 Cong. Rec. 3845 (1878).

The Knott rider was designed instead to assert *congressional control* over the deployment of the Army to enforce the law. As one of its chief proponents put it, the rider was intended "to enable the legislative department of the Government alone to say in what mode and manner the Army raised, equipped, provisioned, and paid by the legislative department of the Government according to the provisions of law shall be used" (7 Cong. Rec. 3845 (1878) (Rep. Hooker)). See also *id.* at 3846-3847 (Rep. Knott); *id.* at 3851 (Rep. Tucker). Disclaiming any intention to make unlawful "[w]hatever it is lawful for an officer or a soldier of the Army to do as the law now exists" (*ibid.* (Rep. Herbert)), supporters simply denounced past instances in which the Army allegedly had been employed "under the pretext of enforcing the laws without one scintilla of authority to be found in any enactment of Congress" (*id.* at 3846 (Rep. Knott)).

What particularly troubled supporters of the Knott rider—and what accounts for the name of the Act today—was an 1854 opinion of the Attorney General advising federal marshals that they were entitled to summon the assistance of the entire "posse comitatus," including "the military of all denominations" (7 Cong. Rec. 3850 (1878) (Rep. Southard)). See 6 Op. Att'y Gen. 466 (1854). "[T]his amendment," Knott declared, "is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws" (*id.* at 3849). "[I]t is to prevent a recurrence of this usurpation of authority * * * that this amendment is proposed," Knott stated (*id.* at 3847).

Over objections that Knott's proposal was a "purely partisan" attempt to embarrass the President (7 Cong. Rec. 3851-3852 (1878) (Rep. Gardner)), the Knott amendment was adopted by the House in an almost strictly party-line vote. See *id.* at 3852, 3877; see generally Siemer & Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 St. John's L. Rev. 1, 29-35 & n.140 (1979).

b. In the Senate, the proposal to attach Representative Knott's amendment to the Army appropriations bill was sponsored by Senators Kernan and Bayard. 7 Cong. Rec. 4239-4240 (1878).[29] When he introduced the rider, Senator Kernan made clear that it was not intended to prevent the deployment of the Army for law enforcement purposes but only to assert the authority of Congress over how the Army was used. As in the House debate, the focus of Kernan's concern was the Attorney General's instruction to the marshals that they were free to use the Army when they deemed that circumstances required (*id.* at 4240). As he put it (*ibid.*), under the proposed amendment "there shall be no right to use the Army as a *posse comitatus* by the peace officers of the State or of the General Government unless there is some

[29] The version of the bill offered in the Senate differed in two principal ways from the House version. First, the Senate sponsors deleted the phrase "under the pretext," presumably in order to defuse the more overtly partisan flavor of the House rider. Second, the Senate amendment sanctioned the use of the Army for law enforcement whenever "authorized by the Constitution"—in recognition of the fact that Congress "cannot limit the power of the President as authorized and granted by the Constitution" (7 Cong. Rec. 4240 (1878) (Sen. Windom)).

statutory or constitutional provision that expressly authorizes it."

Senator Beck, a supporter of the bill, acknowledged that the amendment did not "seek to change" those statutes—including "the civil-rights bill" and "two or three other statutes of that sort"—under which there was existing authority "to call upon the Army" (7 Cong. Rec. 4240 (1878)). Beck insisted that "the whole object of this section * * * [was] to limit the use by the marshals of the Army to cases where by law they are authorized to call for them, and not to assume that they are in any sense a *posse comitatus* to be called upon when there is no authority given them to call upon anything but the *posse comitatus*" (*id.* at 4241). See also *id.* at 4242 (Sen. Kernan).[30] In short, Senator Bayard observed, "the naked proposition was this" (*id.* at 4301):

> [T]hat the Army of the United States was the creature of the Constitution and laws of the United States, that it should not be used except in accordance with the laws of its being, and that he who uses it otherwise than the law and

[30] Two Senate supporters of the Posse Comitatus Act confirmed in yet another way that the Act was not designed to separate the military from all law enforcement functions. Senators Merrimon and Hill contended that it was improper for the Army to execute the law in the "ordinary" (7 Cong. Rec. 4243 (1878) (Sen. Merrimon)) or "proper" (*id.* at 4247 (Sen. Hill)) sense. These Senators equated "executing the laws" with executing the "processes of the courts," and argued that the latter is always a function of civil officers. The Army's role, on the other hand, was to "put[ ] down" "insurrections"—a function that the two Senators broadly defined as "opposition to the execution of the law when that opposition is too great for the civil arm to suppress." *Ibid.* (Sen. Hill); see also *id.* at 4243-4245 (Sen. Merrimon).

the Constitution permitted should be answerable. That was all. That is what the section means.[31]

The Senate accepted the Posse Comitatus rider only after first making both of the changes initially proposed by Kernan and Bayard, see p. 36 n.29, *supra* as well as deleting the requirement that congressional authorization be given "expressly," see p. 34, *supra*. 7 Cong. Rec. 4302 (1878). In addition, the Senate amended the proposal so as to prohibit only the "willful" use of the Army without authority, and it struck altogether the provision establishing criminal penalties. *Id.* at 4302, 4304.

c. The final version of the Posse Comitatus Act was negotiated in conference. The House ultimately agreed to accept all of the Senate's changes in language, insisting only that the criminal penalties and the word "expressly" be restored. 7 Cong. Rec. 4647-4648 (1878). Reporting this compromise back to their respective chambers, the House conferees claimed that the Act confirmed "the great principle that the Army of the United States in time of peace should be under the control of Congress and obedient to its laws" (*id.* at 4686 (Rep. Hewitt)), while the Senate conferees asserted that "the Executive would not be embarrassed by the prohibition of Congress" because "if the power [to use the Army] arises under either the Constitution or the laws it may be exercised" (*id.* at 4648 (Sen. Sargent)).

[31] Even with this limited meaning, the Posse Comitatus rider engendered significant opposition in the Senate. See 7 Cong. Rec. 4241 (1878) (Sen. Blaine); *ibid.* (Sen. Windom); *ibid.* (Sen. McMillan); *id.* at 4241-4242 (Sen. Edmunds); *id.* at 4242 (Sen. Hoar); *id.* at 4296 (Sen. Edmunds); *id.* at 4297 (Sen. Kirkwood); *id.* at 4297-4298 (Sen. Matthews); and *id.* at 4301 (Sen. Christiancy). In response to this criticism, the Senate sponsors of the Posse Comitatus Act strove to minimize its significance. Senator Kernan denied that the proposed legislation would make unlawful anything "which by fair implication" was an authorized use of the Army, and suggested that the word "expressly" was superfluous. *Id.* at 4242, 4246. Similarly, Senator Bayard denied "that there is a diminution of any power under the law or the Constitution by this proposed section." *Id.* at 4296. He further agreed to a proposal to strike the word "expressly," describing it as "perhaps too strong an expression" and conceding that "if the Army were necessarily employed it would be a power lawfully exercised." *Ibid.* Bayard, moreover, emphasized that he viewed the Posse Comitatus Act as merely the statement of a "wholesome" "truism" that was required to placate the House. *Ibid.*

d. This legislative history does not bear out the court of appeals' extravagant assertion that the Posse Comitatus Act was "the embodiment of a long tradition of suspicion and hostility towards the use of military force for domestic purposes" (Pet. App. 25a-26a). The enacting Congress appears to have intended the Act simply as an assertion of congressional control over the military. It manifestly did not intend to eliminate the military's law enforcement functions; still less did it intend to create a constitutional standard of reasonable searches and seizures. Because the court of appeals misread this historical record, it incorporated into the Fourth Amendment a statute that was never meant by its framers to serve such an elevated function.

3. *There Is No Basis For The Court Of Appeals' Belief That The Fourth Amendment Incorporates An Implicit Restriction On The Use Of The Military*

The court of appeals' decision to read into the Fourth Amendment the supposed content of the Posse Comitatus Act is wrong not only in its misreading of that statute, but in its unarticulated premise that the

the Constitution permitted should be answerable. That was all. That is what the section means.[31]

The Senate accepted the Posse Comitatus rider only after first making both of the changes initially proposed by Kernan and Bayard, see p. 36 n.29, *supra* as well as deleting the requirement that congressional authorization be given "expressly," see p. 34, *supra*. 7 Cong. Rec. 4302 (1878). In addition, the Senate amended the proposal so as to prohibit only the "willful" use of the Army without authority, and it struck altogether the provision establishing criminal penalties. *Id.* at 4302, 4304.

c. The final version of the Posse Comitatus Act was negotiated in conference. The House ultimately agreed to accept all of the Senate's changes in language, insisting only that the criminal penalties and the word "expressly" be restored. 7 Cong. Rec. 4647-4648 (1878). Reporting this compromise back to their respective chambers, the House conferees claimed that the Act confirmed "the great principle that the Army of the United States in time of peace should be under the control of Congress and obedient to its laws" (*id.* at 4686 (Rep. Hewitt)), while the Senate conferees asserted that "the Executive would not be embarrassed by the prohibition of Congress" because "if the power [to use the Army] arises under either the Constitution or the laws it may be exercised" (*id.* at 4648 (Sen. Sargent)).

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Fourth Amendment imposes implicit limitations on the role of the military. For two reasons, this premise cannot be sustained. First, the Constitution contains *express* rules governing the role and control of the military, and there is no reason to suppose that the Fourth Amendment was designed to impose additional constraints not mentioned in, or fairly implied by, the other, more explicit provisions. Second, the routine deployment of the military to assist in law enforcement at the time that the Fourth Amendment was passed undermines any suggestion that the Amendment imposes, *sub silentio*, restrictions on how the military may be used.

a. By its terms, the Fourth Amendment says nothing at all about the role of the military in the enforcement of civilian law. Other portions of the Constitution, by contrast, deal quite explicitly with how the military shall be organized, managed, and deployed. Article II, Section 2, Clause 1, provides that the President shall be "Commander in Chief of the Army and Navy of the United States, and of the militia * * * when called into the actual Service of the United States." Article I, Section 8, Clauses 14 and 16, provide that Congress shall "make Rules for the Government and Regulation of the land and naval Forces" as well as for "such Part of [the Militia] as may be employed in the Service of the United States." These provisions, which commit the basic questions about the governance and role of the military to the political branches, are supplemented by Article I, Section 8, Clause 12, which prohibits making appropriations "for a longer Term than two Years" and which was conceived as the "best guard" against "a military Gov[ernmen]t" (2 *The Records of the Federal Convention of 1787*, at 330 (M. Farrand ed. 1966)

[hereinafter Farrand]). See also *The Federalist* No. XLI, in *The Complete Madison* 114 (S. Padover ed. 1953). Finally, in the only constitutional restriction on the role of the military that is "particularly valuable to individuals" (2 H. Storing, *The Complete Anti-Federalist* ¶ 2.8.202, at 329 (1981)), the Third Amendment generally prohibits the quartering of soldiers in any house without the consent of the owner.

The court of appeals acknowledged these constitutional limitations on the role of the military in civilian affairs (Pet. App. 21a), and it did not suggest that the purported use of the military in the present case offends any of these express provisions. Nor could such a claim have plausibly been made. Apart from the Third Amendment, which is plainly not in issue, the Constitution affirmatively leaves decisions about the deployment of the military to the political branches. Nowhere other than in the Third Amendment does the Constitution prescribe how the military may be used, and there is no reason why the Fourth Amendment should be thought silently to incorporate restrictions that were not included in the other, quite explicit portions of the Constitution.

b. As this Court observed in *Carroll* v. *United States*, 267 U.S. 132, 149 (1925), "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted * * *." Accord, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 585-587 (1983); *United States* v. *Ramsey*, 431 U.S. 606, 616-619 & n.14 (1977). The historical setting in which the Fourth Amendment was adopted confirms that the Amendment was not designed implicitly to incorporate restrictions on the use of the military to enforce the law.

It was well understood by the Framers that the military was freely available to assist in law enforcement. During the debates in the 1788 Virginia ratifying convention, Madison was asked why Article I, Section 8, Clause 15 authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union."[32] Madison stated that "the reasons [are] obvious * * *. If resistance should be made to the execution of the laws * * * it ought to be overcome." 3 Farrand 318. Moreover, in *The Federalist* No. XXVIII, Hamilton observed that whether the army or the militia is used "to maintain the just authority of the laws" depends solely on how strong a force the situation requires. Defending the necessity of organizing a strong militia (*The Complete Madison* 47-48 (S. Padover ed. 1953)), Madison asked the Virginia convention, "How is it possible to answer objections against possibility of abuses?"

> It must strike every logical reasoner, that these [abuses] cannot be entirely provided against. I really thought that the objections to the militia [were] at an end. Was there ever a constitution, in which, if authority was vested, it must not have been executed by force, if resisted? Was it not in the contemplation of this state, when contemptuous proceedings were expected, to recur to something of this kind? How is it possible to have a more proper resource than this? That the laws of every country ought to be executed, cannot be denied. That force must be used if necessary, cannot be denied. Can any government be established, that will answer any purpose whatever, unless force be provided for executing its laws?

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[32] See also Amendment II ("[a] well regulated Militia" is "necessary to the security of a free State").

Indeed, in its first session Congress immediately introduced, and later enacted, a bill recognizing the military establishment of October 3, 1787, and authorizing the President to call whatever part of the militia that he thought necessary to protect the frontier from Indian incursions. 1 Stat. 95 (cited in F. Wilson, *Federal Aid in Domestic Disturbances* 25 (1922)). Thereafter, on May 2, 1792, the Second Congress enacted a bill entitled "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions" (1 Stat. 264 (quoted in F. Wilson, *supra*, at 25)). In 1795 Congress replaced this Act with an even broader grant of authority to the President, permitting him to use the militia to enforce the law without advice from Congress or from the Judiciary (1 Stat. 424 (cited in F. Wilson, *supra*, at 34, and G. Fabiano, *The Analysis and Interpretation of the Use of Presidential Authority to Order United States Armed Forces into Military Action to Quell Domestic Disturbances* 56 (1962)). See also p. 25 n.18, *supra*.

Thus, in 1794, President Washington could rely on express statutory authority to send troops to suppress the Whiskey Rebellion. See F. Wilson, *supra*, at 26-33; B. Rich, *The Presidents and Civil Disorder* 2-20 (1941); G. Fabiano, *supra*, at 46-52. Troops were again called upon to restore domestic order in Fries's Insurrection in 1799, to arrest the Burr conspirators in 1807, and to enforce the Embargo in 1808. See F. Wilson, *supra*, at 34-44. Indeed, as part of the Embargo Act, Congress formally authorized the President "to employ * * * such part of the land or naval force of the United States * * * as shall be judged necessary * * * for the purpose of suppressing * * * all cases of insurrection or obstruction to the

laws * * *" (Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 (cited in G. Fabiano, *supra*, at 63-64)).

On this historical record, it is hard to imagine that the Framers intended the Fourth Amendment to impose a set of unstated restrictions on the use of the military.[33] The court of appeals in the present case thought otherwise, electing to read into the Amendment the terms and conditions that Congress provided in the Posse Comitatus Act nearly 100 years after the adoption of the Fourth Amendment. The Constitution cannot abide such freewheeling and ahistorical use of congressional enactments.

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[33] As Story put the matter in his *Commentaries on the Constitution* § 1181 (1833):

> Cases may occur, and indeed are contemplated by the constitution itself to occur, in which military force may be indispensable to enforce the laws, or to suppress domestic insurrections. Where the resistance is confined to a few insurgents, the suppression may be ordinarily and safely confided to the militia. But where it is extensive, * * * it may be important and even necessary to employ regular troops, as at once the most effective, and the most economical force.

See also *In re Debs*, 158 U.S. 564, 582 (1895) ("the army of the Nation, and all of its militia, are at the service of the Nation to compel obedience to its laws").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

BARBARA L. HERWIG
MARC JOHNSTON
Attorneys

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RESPONDENT'S

BRIEF

(5)

No. 86-987

In The

Supreme Court of the United States

October Term, 1986

o

ALEXANDER HAIG, ET AL.,
Petitioners,

v.

GLADYS BISSONETTE, ET AL.,
Respondents.

o

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

BRIEF FOR THE RESPONDENTS

o

DAVID E. ENGDAHL, Counsel of Record for Respondents
31723-A 48th Lane S.W.
Federal Way, WA 98023
(206) 591-2245

KENNETH E. TILSEN
2220 American National
Bank Building
Fifth & Minnesota Sts.
St. Paul, MN 55101
(612) 224-7687

STATEMENT REGARDING QUESTIONS PRESENTED

In our Brief in Opposition To The Petition, at pp. 2 and 6, we objected to the Solicitor's statement of the questions presented. We said that the Petition inaccurately stated not only the holding below and the history of the case, but also the questions presented.

The Solicitor's first "question presented" posits a sweeping ruling which the court below deliberately refused to make. That "issue" is not framed by this record at all and is not in this case. We do not discuss it.

The Solicitor's second "question presented" posits a ruling which is much narrower; but it also is one which the court below deliberately -- and explicitly -- refused to make. The judgment under review does not rely on 18 U.S.C. 1385 "without more."

What is at issue is whether Respondents have stated a claim. (See our Brief in Opposition to Petition, at 6.) The majority below held that Respondents have; but it so held on a ground not fairly represented by the Solicitor's "questions."

The favorable scope of the ruling below is very narrow, only because the court made plain errors with respect to the Fifth as well as the Fourth Amendment principles upon which Respondents rely. All of the Fifth and Fourth Amendment issues considered by the court below are questions presented here.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-987

ALEXANDER HAIG, ET AL., PETITIONERS,

v.

GLADYS BISSONETTE, ET AL., RESPONDENTS

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Respondents suffered adverse judgment on the pleadings, F.R.C.P. 12(c), solely for failure to state a claim, 12(b)(6); but the Court of Appeals reversed.

The Complaint alleges, J.A. 3-6, 8-9, 10-12, that Petitioners by use of arms:

(1) Kept all Respondents confined in Wounded Knee, most for ten weeks; and while Respondents were thus seized
  (a) denied them access to employment, food and medicine, religious practice, and associates;
  (b) surveilled them; and

(c) caused them injury with volleys of aimed and random gunfire; and also

(2) Excluded some Respondents from their homes in Wounded Knee, which therefore perished in fires that Petitioners caused; and also

(3) Confiscated valuable personal effects belonging to Respondents.

Petitioners accomplished the injuries by willfully using parts of the Army and Air Force to execute the laws on the occasion of a civil disturbance and afterwards, even though they knew (and any reasonable person in their positions would have known) that to do so was forbidden by very long established and well understood law. The Complaint identifies almost 50 of the Army and Air Force personnel used by name and rank.

The Complaint, J.A. 13, alleges (in the words of a DoD document prepared at the instance of Petitioners themselves) that this was done for political reasons, not because of any public need.

No pleading claims that any Respondent ever did anything wrong.

SUMMARY OF ARGUMENT

The generalities discussed at pp. 10-17 of the Solicitor's Brief are of no consequence to this case, and are ignored.

The seizure that injured Respondents violated the Fourth and Fifth Amendments. The Constitution provides amply for law enforcement, but limits domestic use of the military to rebellions. Records of the framing and ratification, early Acts of Congress, and case law confirm this.

The Posse Comitatus Act was enacted specifically to reinforce this constitutional limitation, adding penal sanction to the civil remedy already consistently enforced. Until the early 1970's (when this case arose), that Act was obeyed for more than ninety years.

The Court of Appeals preserved only a remnant of the constitutional limitation.

In addition to affirming that remnant, this Court should correct the plain error evident from the record, and broaden the holding to cover the full range of injuries pleaded as caused by the constitutional violations: J.A. 5-6, 9, 10-12, 13-14.

ARGUMENT

I. OUR CONSTITUTIONAL TEXT AND HISTORY BRANDS SEIZURES WITH MILITARY AID "UNREASONABLE"

I.A. English and Colonial Background

The Solicitor correctly notes that mere policy judgments must not be confused with constitutional judgments. Sometimes, however, Congress acts out of constitutional conviction. It did so when it enacted the Posse Comitatus Act, 18 U.S.C. 1385.

While noting the "historical setting" in which the Fourth Amendment was adopted, the Court should not be misled by superficial accounts. The Solicitor claims that "[i]t was well understood by the Framers that the military was freely available to assist in

law enforcement," Pet. Br. at 42. However, anyone sincerely interested in the intent of the Framers, and willing to examine the evidence with candor and care, will find the opposite true.

At the time of ratification, many Americans feared military establishments. Hamilton cautioned that standing armies "have a tendency to destroy [nations'] civil and political rights," and that Europe's armies "bear a malignant aspect to liberty ...." THE FEDERALIST No. 8. Madison warned that "the liberties of Rome fell final victim" to her troops, and "the liberties of Europe ... have with few exceptions been the price of her military establishments," THE FEDERALIST No. 41. As these statements suggest, the fear was not of a military being used to fight foreigners, or Indians on the frontier. Rather, what was feared was military intervention in domestic affairs.

This fear was based on colonial experience, and awareness of history and English law. Informed persons knew that English law distinguished "insurrection" or "rebellion" (synonymous terms), on one hand, from all other domestic circumstances. Insurrection amounted to internal "war;" and otherwise, the realm was legally at "peace" regardless of disorders, mob violence, or riots. Civil disorder was distinguished from insurrection, an often raucous peace was distinguished from war, by whether the courts of law were closed. See Proceedings Against Thomas Earl of Lancaster, 1 St. Tr. 39, 46 (1327) (Cobbett ed. 1809); M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 40 (2d ed. 1716), id. at 34-35 (4th ed. 1792); COKE UPON LITTLETON sect. 412 (1st. Amer. ed. 1853).

The first English riot act, 13 Hen. 4, ch. 7 (1411), provided for suppression of riots only with the posse comitatus, that

already traditional civilian force. York and Tudor kings suppressed disorders with their military; but legal scholars then and now agree that this violated "the law of the land." See F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 266-68 (1908). Indeed, Magna Carta's famous Chapter 39 specifically targeted John's propensity to force his will by military means. Its "law of the land" clause was taken by Parliament as the ground for denouncing the 1322 military seizure of certain earls by Edward II. See Proceedings Against Thomas Earl of Lancaster, 1 St. Tr. 39, 46 (1327) (Cobbett ed. 1809); Edmund Earl of Kent's case, in M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 40-41 (2d ed. 1716).

This rule limiting domestic use of the military was already 499 years old when a new riot act was passed in 1714. 1 Geo. 1, stat. 2, ch. 5. Like the old one, it only authorized civil officers and the civilian

posse comitatus to suppress riot and civil disorder. Making the contrast unmistakable, a separate statute enacted the same year did authorize use of the military, but only for "insurrection" (rebellion) and for "invasion." 1 Geo. 1, stat. 2, ch. 14.

That is why the Deputy Judge Advocate General of England informed General Gage that his military methods of law enforcement in Montreal (before moving on to New York) were illegal. Letter printed in F. WIENER, CIVILIANS UNDER MILITARY JUSTICE at 254 (1967). That is why, after Gage in 1763 became Commander in Chief of Britain's North American forces, his use of Redcoats against colonial rioters excited outrage. That also is why the citizens of Boston became enraged to the point of bloody confrontation in March, 1770.

The Administration of Justice Act confirmed the ancient law permitting only civilian means to suppress disorder. 14 Geo.

3, c. 39 (1774). Yet American colonists watched through 1775 as British Regulars were used for that purpose. These Redcoats were not marauders; but in the course of their law enforcement actions, colonists sometimes were killed.

The Americans knew that, when this happened, the single fact that soldiers rather than civilians had acted was enough to make the killing murder. As Lord Chief Justice Coke had said, the killing of any civilian under military aegis in a time of peace "is murder; for this is against Magna Charta ...." E. COKE, THIRD INSTITUTE 52 (1644), citing ch. 39, the "law of the land" provision. The rule as stated by Coke was quoted in the popular W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. I, at 400 (1765). (Blackstone by error cited the irrelevant ch. 29 of Magna Carta.)

There were prominent examples of the application of this rule. See, e.g., Trial

of Captain Porteous, 17 St. Tr. 923 (1736) (Howell ed. 1813) (commander of a contingent of troops which fired on an Edinburgh mob, sentenced to death for the "murders.") Because of this rule, it was proper that the Redcoats of the Boston "Massacre" be indicted and tried for murder. Trial of Wemms and Seven Others, 10 Am. St. Tr. 415 (1770) (Lawson ed. 1918). The rule made it murder regardless of circumstances that would justify a civilian's identical act. The "Massacre" defendants escaped on self defense grounds, only because the judges refused to apply the rule of Coke and Blackstone and instructed instead that

> they rather come within the reason of civil officers and their assistants, and so are alike under the peculiar protection of the law.

10 Am. St. Tr. at 505-06. No wonder informed Americans railed!

There is still more proof that American colonists knew and insisted upon this English rule. The same Administration of Justice Act allowed prosecutions for violence in subduing riots to be removed for trial to distant colonies, or even England. The inconvenience and cost of transporting witnesses made conviction in such cases almost impossible. The draftsmen of the Declaration of Independence thus showed familiarity with the English rule against domestic use of the military when they denounced King and Parliament "for protecting [British troops], by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States."

I.B. The Constitutional Convention

The veterans of the Revolution who gathered in Philadelphia two centuries ago were no farther in time from General Gage's lawless use of the military than we are from Watergate; and they were no quicker than we to forget. Such a Convention was unlikely to propose that a new Government use the

military in the same way that provoked such outrage a few years before.

No clause in the Constitution authorizes domestic use of the military in situations short of actual rebellion. However, two clauses do contain language which might be so misconstrued, if read superficially and without reference to the Convention record. These clauses evoked clamorous opposition to ratification, so Hamilton and Madison clarified the point in THE FEDERALIST.

One of these clauses is that part of the Guaranty Clause which provides that

> [t]he United States ... shall protect each [State, on request] ... against domestic Violence.

Art. IV, sec. 4.[1] In BLACKSTONE, "domestic

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1. This language vests no power in the executive branch; the duty is imposed on "the United States," and therefore the means of fulfilling the duty reside in the discretion of Congress under its general authority to
> make all Laws ... for carrying into Execution ... all ... Powers vested by this Constitution in the Government of the United States ....

Art. I, sec. 8, cl. 18 (emphasis added). Congress might leave it to the President to determine whether the conditions Congress has prescribed are present; that was recognized in Martin v. Mott, 12 Wheat. (25 U.S.) 19, 30 (1827). But the President himself may not prescribe the conditions, nor contravene nor act in the absence of some law that Congress enacts. Arguments based on a Commander in Chief's discretion miss the point that Congress alone is authorized to decide under what circumstances military means are "necessary and proper" to execute the Guaranty Clause duty.

Violence" is a term of art contemplating such violence as threatens overthrow of the government. See 1 COMMENTARIES at 400. The danger of misconstruction arises because, if used more loosely, the term could comprehend civil disorders or riots. Used even more loosely, the term could include spousal assault and child abuse. No one pretends the Guaranty Clause concerns the latter; but taking it to comprehend civil

disorders or riots is no less erroneous.

The term's context as well as Convention records show that it is used in the Constitution in BLACKSTONE's specialized sense. Only actual rebellion compares in gravity to invasion, the other exigency addressed in the same phrase; and nothing of lesser gravity was mentioned in any of its Convention discussion. See 2 FARRAND, RECORDS [OF THE FEDERAL CONVENTION] 47-9, 317-18, 466-67 (1911). The Convention apparently preferred BLACKSTONE's term of art over the word "insurrection" because the latter connotes rebellion by private persons, whereas the Framers meant to include violent struggles for power among branches of a State's government itself. See 2 FARRAND, RECORDS at 317-18, 466-67. No delegate even hinted that the clause might permit federal intervention in ordinary police matters such as mob violence and riots.

The other readily misconstrued clause gives Congress power

> [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions ....

Art. I, Sec. 8, cl. 15. This "Calling Forth" clause differs from the Guaranty Clause in that its aim is integrity of the Union rather than of the States. Opponents of ratification took it to mean that the military would be enforcing routine federal laws. Convention records, however, prove the contrary.

As already noted, the word insurrection connotes an uprising by private citizens. The Framers also had to reckon that State governments might turn against the nation. That is a risk peculiar to federations, and legal terms inherited from centralized England were less than adequate to address it.

Randolph's "Virginia Plan," addressed this peculiar risk in the last clause of

Resolution 6, suggesting that the "National Legislature" be empowered

> to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.

1 FARRAND, RECORDS 21. Resolution 6 of Paterson's later "New Jersey Plan" suggested that, if any State (or private group)

> oppose or prevent ye. carrying into execution such [federal] acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience

Id. at 245. Paterson's proposal differed from Randolph's in that it vested discretion in the executive rather than the legislative branch. Both, however, aimed specifically at affronts to national authority by duly constituted State governments.

When Madison questioned the use of force "applied to people collectively" (i.e., to States), the last clause of Randolph's Resolution 6 was "postponed." Id. at 54. But

the Committee of Detail blended the proposals to produce the penulimate clause of Article VII, Sect. 1 of that Committee's August 6 Report. See 2 FARRAND, RECORDS at 182. With very little change, this took on the final form of the Calling Forth clause, and was "passed in the affirmative nem: contradicente." Id. at 390.

The total lack of objection to the Calling Forth clause, even from delegates most fearful of military intervention, would be odd if the clause contemplated ordinary law enforcement. There are still more indications, however, that it did not.

The Calling Forth clause had been postponed when it was first reached on August 20, making way for an elaborate discussion of "treason." The treason debate focused on whether a distinction could or should be drawn between treason against a State and treason against the United States. The delegates endorsed a limited scope for the

Treason Clause only after Roger Sherman had suggested that

> [R]esistance agst. the laws of the U-States as distinguished from resistance agst the laws of a particular State, forms the line- ....

2 FARRAND, RECORDS at 349.

What was understood by "resistance agst. the laws" in this context plainly was more than simple disobedience. The subject was treason, and they meant resistance amounting to "war," as Rufus King said, id.; "war or insurection," as John Dickinson said, id. To "execute the Laws of the Union" in the face of such "resistance" would be to subdue overt treason.

Action on the Calling Forth clause came only three days later, while the treason discussion still was fresh in everyone's mind. Sherman's description of treason in terms of "resistance agst. the laws," and the equation of such "resistance" with "war," explain why no one objected to the

Calling Forth clause. Given that setting, "to execute the Laws of the Union" means no less than to enforce the laws which maintain and preserve the Union.

"Resistance" that constitutes treason, on the part of private individuals, is precisely what constitutes "insurrection;" and military response to that kind of resistance always has been allowed, as surely as to "invasion." The same kind of resistance to federal authority, but by State governments instead of individuals, is what the Randolph and Paterson proposals had addressed. The Detail Committee's "execute the Laws" language differs none in purpose, and precious little in words. What is meant is outright rebellion, technically different from insurrection only because governments are in revolt. No wonder no delegate found reason even to whisper dissent!

I.C. THE FEDERALIST and Ratification

The foregoing examination of Convention records makes it clear that the Framers contemplated domestic use of the military only in circumstances tantamount to war. The Convention records, however, were not made available to those considering ratification. Because the words chosen by the Framers also are susceptible of broader interpretations, it is not surprising that fears of military intervention were promptly expressed.

One third of Pennsylvania's delegates voted against ratification and afterwards published a pamphlet in which they attacked the Constitution as contemplating military enforcement of federal laws. See Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787, in 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 671-72 (1971).

The Pennsylvania pamphlet provoked immediate and extensive response in THE FEDERALIST. Discussing the "domestic Violence" phrase of the Guaranty Clause in No. 43, Madison alluded to Shay's Rebellion in Massachusetts in 1786 -- an outright insurrection which disabled the civilian government and closed the law courts. (Both he and Hamilton had made the same allusion at the Convention, Hamilton on June 18 and Madison the next day.) Madison took "domestic Violence" to mean "a bloody and obstinate contest" between "violent factions, flying to arms and tearing a State to pieces;" and he quoted an observation of Montesquieu concerning "popular insurrection." Ibid.

Later, when a delegate to the Virginia convention asked "why the congress were to have power to provide for calling forth the militia, to put the laws of the union in execution," Madison answered that this power would be needed "[i]f insurrections

should arise ...." Quoted in 3 FARRAND, RECORDS at 318-19. (Referring to this same comment, the Solicitor twists Madison's meaning by omitting the careful limitation to "insurrections." Pet. Br. at 42.)

Hamilton was more elaborate. At the end of THE FEDERALIST No. 26, he noted that "domestic insurrection" no less than "foreign war" posits the very opposite of a "time of peace," adding, "few persons will be so visionary, as seriously to contend, that military forces ought not to be raised to quell a rebellion ...." (Emphasis added.) Again in No. 28 he stressed that recourse to the military -- whether militia or regulars (see Solicitor's Brief at 42) -- was only for "seditions and insurrections," "to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions." (Emphasis added.) And in the last paragraph of No. 29 he maintained that

one State's militia might be marched into another only in circumstances of "invasion" or "[i]n times of insurrection ... to guard the public against the violences of faction or sedition." (Emphasis added.)

Hamilton specifically refuted the claim that the Calling Forth clause, coupled with the lack of elaborate provisions regarding law enforcement, meant that military execution of federal laws should be expected. Critics had inferred that the Government's "only auxiliary" would be the military; but Hamilton argued at the close of No. 27 that

> extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws.

By dint of the Supremacy Clause, Hamilton reasoned, each State's various officials

> will be incorporated into the operations of the national government ...; and will be rendered auxiliary to the enforcement of its laws.

Finally, in the fourth paragraph of No. 29 he pointed out that the Necessary and Proper Clause gives ample authority to legislate "for calling out the POSSE COMITATUS to assist the [federal magistrate] in the execution of his duty." (Emphasis in original.) Hence the inference that military force would be necessary was "uncandid" and "illogical."

Thus Hamilton at once showed that the Constitution does not contemplate military means for law enforcement, except when resistance amounts to rebellion, and that it does provide amply for civilian means.

I.D. Early Construction, and the Bill of Rights

Congress acted upon the same understanding once the new Constitution was in force. Section 27 of the 1789 Judiciary Act, 1 Stat. 73, 87, gave federal marshals "power to command all necessary assistance in the execution of [their] duty ...." This ena-

bled them to use the traditional posse, as Hamilton had foreseen. As to the military, the first Congress dealt only with Indians on the frontiers (1 Stat. 95, at 95-96); but the second passed the important Act of May 2, 1792, 1 Stat. 264.

The Solicitor notices this 1792 Act, but misses all of its significance. Pet. Br. at 43. Section 1 of the Act implemented the "domestic Violence" provision of the Guaranty Clause; but Congress did not use that easily misunderstood term. Instead, construing the Constitution as Madison and Hamilton had construed it, Congress authorized use of the militia to suppress "an insurrection in any state, against the government thereof." (This section survives, as amended, in 10 U.S.C. 331.)

Other sections of the 1792 Act implemented the "Calling Forth" clause. As introduced, section 2 simply repeated the words of that clause, "to execute the laws

of the Union." But this aroused concern in the House, see 3 ANN. OF CONG. 574-77. In a statute, those words might be read with more latitude than the Constitution contemplated.

The bill was therefore amended. First a new section was added to affirm and clarify the Judiciary Act's authorization of posse comitatus practice. It said that federal marshals and their deputies have

> the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law in executing the laws of their respective states.

This became section 9 of the 1792 Act, 1 Stat. at 264-65. Once that was done, section 2 was amended to authorize use of the militia only when federal law was

> opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act ....

1 Stat. at 264 (emphasis added). This meant that militia could be used only when civil authority was overwhelmed -- and that meant insurrection.

Another amendment required that formal notice of the insurrection be given to the President by a judge before militia could be used. Yet another required the President, before using militia, to issue a Proclamation commanding "such insurgents" to yield. (The Proclamation requirement survives as 10 U.S.C. 334.)

This was the law as it stood at the time of the 1794 "Whiskey Rebellion," mentioned in Pet. Br. at 43. That event illustrates the point that the Solicitor misses: The military could be used only for rebellions.

From information reaching the federal Government in Philadelphia, the situation in western Pennsylvania seemed to be an insurrection. The traditional criterion for insurrection was whether civil government

was so overwhelmed that the courts had been closed. Supra at 6. The federal court could not sit there; indeed, special legislation was required to revive process discontinued when the court missed its term. Act of Jan. 28, 1795, ch. 12, 1 Stat. 410.

Associate Justice James Wilson officially noted on August 4 that the area was in "rebellion." Washington issued the requisite Proclamation, saying the "insurgents" had perpetrated "acts which I am advised amount to treason, being overt acts of levying war against the United States ...," 4 ANN. OF CONG. at 1412. Only then were militia deployed.

The few hapless leaders were prosecuted for treason: See U.S. v. The Insurgents of Pennsylvania, 2 Dall. (2 U.S.) 335, 343, 345, 346, 348, 357 (C.C. Pa. 1795). Two were convicted. Justice Paterson's jury instructions distinguished between resist-

ance to the law amounting to treason, and resistance of a lesser nature. Id. at 355.

Yet, when hindsight showed that the danger was less than poor communications had made it seem, Treasury Secretary Hamilton (who accompanied the expedition as acting Secretary of War) doubted whether military action had been justified at all. See T. SLAUGHTER, THE WHISKEY REBELLION chs. 11-13 (1986). On Hamilton's suggestion, the convicted traitors were pardoned.

This hardly supports the Solicitor's claim that the military was considered to be freely available for domestic use.

The 1792 Act was limited to three years; but its successor made no material change. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424. The 1975 Act did not give "an even broader grant of authority to the President" as the Solicitor asserts. See Pet. Br. at 43. Presidential notification by a judge had proved no safeguard in the Whiskey Rebel-

lion, so that requirement was omitted. However, the 1795 Act prohibited any use of militia under section 2 from continuing more than thirty days after Congress convened. Also, the 1795 Act, just like the 1792 one, applied only to "insurgents" -- to "combinations too powerful to be suppressed by" civilian authorities, including marshals with the posse comitatus. See secs. 2, 3, & 9, 1 Stat. 424-25. (Today's 10 U.S.C. 332 is an 1861 revision of the 1795 statute's section 2. The 1861 change was dramatic, see infra at 70-71.)

The Solicitor thinks it significant that the 1792 Act (and its 1795 equivalent) "was enacted without any suggestion that the Fourth Amendment, then barely a year old, might inhibit such uses of the military." Pet. Br. at 25 n. 18. But, no wonder! The Act applied only to insurrection -- civil war -- which <u>always</u> had justified use of the military!

The Bill of Rights was proposed barely fifteen years after the peacetime military seizures, dispersals, and searches under General Gage had ended. It amended a Constitution that had been opposed as authorizing military aid to law enforcement. In spite of THE FEDERALIST's assurances to the contrary, Pennsylvania, Virginia, New York, New Hampshire, North Carolina, and Rhode Island had demanded amendments specifically to prevent military abuse.

Perhaps not every ratifier knew that the limitation on domestic use of the military had its origin in Magna Carta's "law of the land" clause; but any of them familiar with BLACKSTONE certainly did. Those lawyers and educated laymen must have seen the Due Process clause as perfectly crafted to embrace this basic element of English law.

Even if some ratifiers missed that feature of the Due Process clause, however, it defies belief that any survivor of the pre-

Revolution regime of General Gage, asked to ratify what now is the Fourth Amendment, could have believed seizures with military assistance to be anything other than unreasonable per se, unless during rebellion.

The Solicitor again shows his misunderstanding of early practice by his reference to Fries's Insurrection of 1799, the Burr conspiracy of 1807, and the Embargo of 1808. Pet. Br. at 43-44.

Fries's was, indeed, an insurrection, so using the military was of course proper. Fries himself was indicted and tried for treason. After conviction he was granted a new trial because of a biased juror, and convicted again. Trial of John Fries, 11 Am. St. Tr. 1 (1799)(Lawson ed. 1919); Second Trial of John Fries, id. at 146 (1800).

Burr attempted to seize part of the new Louisiana territory, oust the government of the United States, and make an independent empire. Jefferson and the Congress called

it "insurrection." 9 ANN. OF CONG. 332-33, 362-73; 664-72. Burr was indicted and tried for treason. The Act authorizing use of the military to clear Burr's squatters from the Territory should civil officers be unable to do so (ch. 46, 2 Stat. 445), was enacted the same day in 1807 as another, discussed next below, that restricted such use to "insurrection."

The Solicitor misrepresents the Act he misquotes with reference to "the Embargo in 1808." The Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, was not a "part of the Embargo Act," as the Solicitor claims. Pet. Br. at 43. It was a one section measure enacted nine months earlier, and it did not (as the Solicitor intimates) increase the occasions for domestic military use.

The Solicitor, in his curiously edited version, omits the most material phrases of the 1807 Act. It merely allowed the Army and Navy, which by 1807 were displacing

militia as the mainstay of defense, to be used in the same circumstances:

> [I]n all cases of insurrection, or obstruction to the laws, ... where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the prerequisites of the law in that respect.

2 Stat. 443 (emphasis added). This meant that all the requirements of the still operative 1795 Act must be met. Nothing but resistance amounting to treason, to war, could justify any military role. The civilian force of marshals with the posse comitatus must be outmatched. And a presidential Proclamation to the "insurgents" must precede any use of the military.

Jefferson did use some military to help enforce his embargo; but it was unlawful. One Hoxie stole an impounded raft from its military guard and, after a gun battle with

the soldiers, crossed it to Canada. For this the Jefferson administration tried him for treason. U.S. v. Hoxie, 26 Fed. Cas. 397 (No. 15,407) (C.C.D. Vt. 1808). But he was acquitted. Justice Livingston, presiding at Circuit, distinguished Fries's and the Whiskey Rebellions and held that violating the law, or even gunfighting with soldiers, is not enough to constitute insurrection. There must a "levying of war,"

> for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of Congress.

Id. at 398.

After the embargo fiasco, no federal military was domestically deployed until the Dorr Rebellion that split Rhode Island in 1842; and that insurrection was over before the federal help arrived. Jackson postured and prepared and issued the requisite proclamation when South Carolina prepared for war over "Nullification" in 1832; but the

State recanted before any force was used. VanBuren denied a request from Pennsylvania for military aid in 1838; and the federal arsenal commander who supplied ordnance to state forces on that occasion was reprimanded by the War Department for acting without authority.

All this is documented in B. RICH, THE PRESIDENTS AND CIVIL DISORDER chs. 1-4 (1941), and is evident to anyone who reads that dissertation instead of just tossing it in as a citation. See Pet. Br. at 43.

In sum, had this case now at bar arisen in the first sixty years of our history no one would have doubted that the facts here alleged show major violations of both the Fourth and Fifth Amendments. In fact, similar cases did arise, and relief was always given. See infra at 49-51 and 64-67. Confusion occurs now, only because of complicated developments later, considered below.

II. FOR ABOUT 25 YEARS BEFORE THE POSSE COMITATUS ACT, AMERICAN USAGE DEPARTED FROM THE CONSTITUTIONAL NORM

II.A. The Corruption Began in England

Although English law for centuries had approved domestic military use only for situations amounting to "war," an innovation occurred in 1780. In June that year, extremist Protestants ravaged London for a week -- firing Catholic churches, cowing Parliament to adjournment, breaking open four jails, and burning 72 houses (including Chief Justice Mansfield's, with its magnificent library). Constables alone were no match, and Mansfield urged unsuccesfully that justices of the peace call the posse comitatus under the Riot Act. At last the King called in the Redcoats, and with a few volleys of musket fire the riots were ended.

When Parliament met afterwards, declamations of the wanton destruction were match-

ed only by the exclamations of outrage that the military had been used. At last the aged Chief Justice rose to speak. Confessing he had not consulted books on the point ("indeed, I have no books to consult"), but reasoning "as well as my memory serves me" from the Riot Act and the general law, he defended the King's use of troops:

> ... I presume it is known ... that every individual, in his private capacity, may lawfully interfere to suppress a riot .... Not only is he authorized ..., but it is his duty to do so; and, if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens. ...
>
> The persons who assisted in the suppression of these tumults are to be considered mere private individuals acting as duty required. ...
>
> ... The military have been called in ... not as soldiers, but as citizens. No matter whether their coats be red or brown ....

21 PARLIAMENTARY HISTORY OF ENGLAND 688-98 (Cobbett ed. 1814) (emphasis added).

Mansfield's theory had a ring of the familiar, but in substance it was entirely new. Ever since the 1181 Assize of Arms, English men had comprised the "jurata ad arma," their war duties enforced by the Earl Marshal of England, whose edicts were the antecedent of martial[2] law. By ordinances of 1233 and 1252,[3] Henry III directed that this same jurata ad arma pursue malefactors upon the hue and cry. To make this use comport with Magna Carta's rule against military law enforcement, however, he obliged the jurata in this capacity to report to local sheriffs and made obedience enforcible, not by the Earl Marshal, but by the King's Justices. Over time, the jurata

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2. The etymology of the two words differs, but "marshal" and "martial" were used interchangeably. See F. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND at 266 (1908).

3. Writ for the Conservation of the Peace, 1233, in W. STUBBS, SELECT CHARTERS OF ENGLISH CONSTITUTIONAL HISTORY at 362-63 (8th ed. 1895); Writ for Enforcing Watch and Ward and the Assize of Arms, 1252, id. at 370-73. For the 1181 Assize of Arms itself, see id. at 153.

in this civil role evolved into the posse comitatus, while in its military role it evolved into the militia. Their membership was the same; posse and militia were distinguished by the command lines and the law that applied.

Superficially, Mansfield's theory merely emphasized the identity of the jurata's members in their two different roles. But there was a fallacy: British regulars in the eighteenth century bore no real resemblance to the jurata ad arma. They were drawn from all counties of the kingdom to comprise a professional force.

Nonetheless, although counsel observed that the new theory had left Lords in Parliament "planet-struck" when it was first announced, Mansfield based his jury charge on it when the mayor of London was prosecuted for failing to call out the Redcoat "posse" sooner. Rex v. Kennett, 5 Car. & P. 282. 291, 294, 172 Eng. Rep. 976, 982,

984 (1781). Fifty years later, Mansfield's theory still was followed in England. See Rex v. Pinney, 5 Car. & P. 254, 263 n. (b), 172 Eng. Rep. 962, 967 n.(b) (1832) (Chief Justice Tindal charging grand jury after riots in Bristol).

II.B. The Corruption Reached America in the 1850's

In America, where Gage's Redcoats were remembered well, Mansfield's new theory did not catch on quickly. It was not mentioned at Philadelphia, nor at any ratification convention, nor in political tracts, including THE FEDERALIST. No reference to it appears in Congress' records concerning the 1792 and 1795 Acts about militia use, or the 1807 Act establishing the same rules for use of the regular army and navy.

In fact, there is no good evidence of Mansfield's theory in this country before 1850. The oldest known reference to it is in an 1854 Opinion of Attorney General

Cushing concerning enforcement of the 1850 Fugitive Slave Law. 6 Op. A.G. 466 (1854) (citing Mansfield's speech to Parliament.) The facts before Cushing involved a federal marshal in Chicago who had called upon "a party of militia;" but Cushing applied the theory to

> the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshall. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus.

6 Op. A.G. at 473 (emphasis in original). On this theory, the Army thereafter routinely was used to help execute the Fugitive Slave Law.

Mansfield's subtle distinction between soldiers "as soldiers" and soldiers "as citizens" meant nothing to ordinary people, and the appearance of federal troops served to inflame abolitionist sentiments even more. In Boston in 1854, a United States

marshal and district attorney held a fugitive slave in custody with the aid of federal troops as their Mansfield "posse;" but apprehensive that this military presence might itself provoke a riot, they persuaded the mayor to call out militia to help local police secure order. The Boston police and that state militia "posse" then proceeded "to clear and guard the streets along which the marshal was to march with his posse." Someone was knocked down and cut by a militia officer, and in ensuing litigation the Mansfield "posse" theory was extended to militia use by state and local officials. Ela v. Smith, 71 Mass. (5 Gray) 121, 139, 66 Am. Dec. 356, 362 (Sup. Jud. Ct., Norfolk Co., 1855) (citing Rex v. Pinney, supra, the Bristol riots case that relied upon Mansfield).

II.C. The Result Was Increased Use Of the Military, Even Though Courts Held Such Use Unconstitutional and Gave Civil Relief

This new American reliance on the Mansfield military-as-civilian "posse" idea turned things topsy-turvy. It was the eve of the Civil War; and the times were all out of joint.

President Buchanan illustrates the remarkable confusion. Shortly after taking office, he approved a request from the mayor of Washington, D.C., for marines to stand by at a polling place earlier closed because of unrest. The D.C. Criminal Court acknowledged that the 1795 and 1807 Acts, still in force, applied "to a different class of contingencies ...," and approved what was done on the "posse" theory. U.S. v. Stewart, 27 Fed. Cas. 1339, at 1341 (No. 16,401a) (Crim. Ct. D.C. 1857).

Yet, having thus used the military for a petty incident, Buchanan disclaimed any au-

thority to send troops into South Carolina when the Confederate Rebellion was flagrant there! In December, 1860, in his Fourth Annual Message to Congress, Buchanan reasoned that while the military could be used to aid federal civil officials,

> [w]e no longer have a district judge, a district attorney, or a marshal in South Carolina. In fact, the whole machinery of the Federal Government necessary for the distribution of remedial justice among the people has been demolished ....

5 J. RICHARDSON, A COMPILATION OP THE MESSAGES AND PAPERS OF THE PRESIDENTS 634 (1897).

Buchanan's ridiculous position relied on an Opinion rendered two weeks earlier by Attorney General Jeremiah Black, 9 Op. A.G. 516 (1860). Referring not at all to the Convention history, which by then was published and available, nor to ratification era materials, nor to legislative history of the 1792, 1795, and 1807 statutes, Black asserted that those existing laws made no

provision at all for military response to insurrection against the Union! See 9 Op. A.G. at 524. If federal civilian officials were no longer present, "troops would certainly be out of place, and their use wholly illegal." Id. at 523. Black construed the statutory and Constitutional references to "executing the laws of the Union" not as they had been understood before, but as contemplating the novel soldier-qua-citizen "posse" theory. Id. at 522, 524.

Within three months, Buchanan's claim of helplessness in the face of rebellion was repudiated by Lincoln. But Lincoln's Attorney General, Edward Bates, went clear to the opposite extreme, postulating for the first time in American history an inherent and unlimitable presidential power to make domestic use of the military -- not merely as a Mansfield "posse," but at the President's sole discretion! 10 Op. A.G. 74, 79-81, 86 (1861).

Bates said the enumerated powers doctrine is inapplicable to the President:

> The executive powers are granted generally, and without specification; the powers not executive are granted specially ....

Id. at 82 (emphasis in original). These executive powers Bates described as

> that class which, in England, are called prerogative powers, inherent in the crown. And yet the framers of our Constitution thought proper to preserve them, and to vest them in the President ....

Id. On this basis he advised that the President could use Union soldiers to seize and imprison civilian "suspected accomplices" of the rebels, even in loyal States, and hold them indefinitely without charges in order to "render[] them powerless for mischief," simply ignoring writs of habeas corpus issued by courts on their behalf. Id. at 83-4, 90, 91.

What ensued was extraordinary. Where there was no rebellion, assemblies protesting the draft or arrests of deserters were

put to flight by bayonets. Persons suspected of disloyalty or espionage were held in military prisons for months or years, without charges or trial. Historians report more than 13,000 civilians confined by the Union military in the North.

Bates' view of the President's power, and Lincoln's actions upon it, met with consistent judicial rebuke. Already the Chief Justice in chambers had ordered John Merryman released from military seizure in Maryland. Whether Taney's formal opinion in Ex parte Merryman, 17 Fed.Cas. 144 (1861) (wrongly reported as a decision at Circuit), was actually completed before Bates' July 5 Opinion is uncertain; neither refers to the other. But Taney's opinion, heavy with the English and early American authority Bates totally ignored, expressly claimed Magna Carta and the Fifth Amendment's Due Process clause as contrary to Bates' prerogative theory.

Indiana's Supreme Court held a military arrest and confinement under Bates' thesis unconstitutional under both the Fourth Amendment and the Fifth Amendment's Due Process Clause. Griffin v. Wilcox, 21 Ind. 370, 373, 387, 391 (1863).

The Illinois Supreme Court also cited both the Fourth Amendment and the Due Process clause in rejecting Bates' thesis to sustain a trespass claim. Johnson v. Jones, 44 Ill. 142, 148 (1867). Plaintiff's demurrer to defendant marshals' special pleas admitted he was involved in treasonous activities, for which he could have been held for trial. Id. at 145-46. Nonetheess the marshals were liable for seizing and delivering him into military custody as directed by the Commander in Chief. "The necessity of arresting [him] is conceded," but "the appeal to the military arm ... is needless." The government is "not able to arrest by means of military

force ...," and for doing so the marshals were held liable. Id. at 159.

A federal court awarded damages to one seized by soldiers in California in June, 1865, and held in military prison, under a military order designed to control violence in the wake of Lincoln's assassination. McCall v. McDowell, 15 Fed. Cas. 1235 (C.C. D. Cal. 1867).

Lambdin P. Milligan won damages for a military confinement that was justified under Bates' thesis. Milligan v. Hovey, 17 Fed. Cas. 380 (C.C.D. Ind. 1871). Milligan's release had been ordered on habeas corpus, giving the Supreme Court occasion to excoriate Bates' thesis on Due Process and other grounds. Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1866). Few opinions of this Court show such fervor as Milligan's.

Although the facts of Milligan included a military trial, this Court went out of its way to recognize and endorse (4 Wall.

at 129) two New York decisions from the War of 1812 era, involving military arrest and confinement pre-trial or without trial: Smith v. Shaw, 12 Johns. 257 (N.Y. 1815), and McConnell v. Hampton, 12 Johns. 234 (N.Y. 1815). In each case there was probable cause and good faith, which would have justified seizure and confinement by civilian means. The plaintiffs prevailed solely because military means were used instead.

Thus, the constitutional rule against military involvement in law enforcement was considered so fundamental that the judiciary continued to enforce it even when confusion and distemper caused the executive branch for more than two decades to stray.

III. CONGRESS PASSED THE POSSE COMITATUS ACT AS AN EFFORT TO RESTORE THE CONSTITUTIONAL NORM

III.A. The Precipitating Cause Was Use Of the Military by President Grant

The statute Petitioners violated when they injured Respondents reinforces the

constitutional restriction on use of the military, and was enacted specifically for that reason.

Near the close of President Grant's second term, reports circulated in Congress that the military was interfering with civil government and seizing people in southern States where Reconstruction already was complete. Both houses therefore passed resolutions in December 1876, asking Grant to account for his domestic military use. 5 CONG. REC. 47-54 (Senate); id., 112-13 (House). Just six weeks before leaving office, Grant sent the House his reply. It is printed in 7 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 418-21 (1898).

In his reply, Grant claimed three different bases for the several instances in which the military had been used. Some instances, he said, were authorized by one or another statute. For others, he cited the Mansfield posse theory, articulated in the

1854 Attorney General's Opinion discussed at p. 42 supra. For the remainder, Grant propounded a thesis similar to that of Attorney General Bates' 1861 Opinion, but more sweeping because Grant applied it years after the Civil War was over. He said the military was

> employed to secure the better execution of the laws of the United States, and to preserve the peace of the United States,

pursuant to his purportedly inherent

> power, as Commander of the Army and Navy, to prevent or suppress resistance to the laws of the United States ....

7 J. RICHARDSON, supra, at 421.

As support for this stunning claim of inherent prerogative, Grant cited a hodgepodge of historical incidents; but every one of those incidents was actually an application of one of the statutes or else of the "posse" theory. There was no precedent whatever for Grant's claim of inherent ex-

ecutive power, apart from Bates' judicially denounced thesis.

Grant's use of the posse theory, and his claim of prerogative to use the military "otherwise" for law enforcement, alarmed Capitol Hill. The House within six weeks considered a response, but it was poorly conceived and served only to delay army appropriations for 1877. After an intervening election, however, the next Congress was prepared to act. The House put a rider on the army appropriation bill for 1878, and with Senate approval it became law. Somehow it got the inaccurate nickname, "Posse Comitatus Act." With relatively minor subsequent amendments, it remains in force as 18 U.S.C. 1385:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

III.B. The Act Had Exactly the Purpose the Solicitor Denies

The Solicitor, by selective quotation at Pet. Br. 31-39, puts the legislative history of this Act in false light. He claims that it was merely a "housekeeping" measure "distribut[ing] ... law enforcement re ..nsibilities ...." Id. at 17.

This Court should not trust either adversary's representations, but should read the entire relevant record for itself. That record is short, including only each house's discussion of the Knott rider: 7 CONG. REC. 3845-52 (House), and 4239-48 plus 4295-305 (Senate).[4]

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4. The Solicitor, Pet. Br. at 32-33 and n. 26, cites a congeries of comments made over five days and 200 pages of debate on the appropriations bill as a whole, and even some on the bill rejected the year before by the previous Congress (p. 31 n. 25). No harm will come from reading all that, but it is not germane to the Act or this case.
   For example, the Solicitor says at 31-2 that the "initial guise" of the Knott rider was moved by Kimmel of Maryland; but that is untrue. Kimmel's time expired before he had finished speaking, and Humphrey of Wisconsin refused to yield. 7 CONG. REC. at 3586, col. 2. Kimmel therefore

Certainly the members of Congress were not of one mind. Some supported the military "posse" and executive prerogative ideas that others denounced. There were derisive rebukes, rhetorical flourishes, and some signs of serious confusion. But three points stand out clearly: (1) This Act was conceived, and its deliberate and forceful wording insisted upon, precisely to repudiate any claim of inherent power, or extra-statutory executive prerogative, to use the military for law enforcement; (2) it was enacted with knowledge, articulated by both opponents and proponents, that the acts it made criminal already were actionable as civil wrongs; and (3) it was impelled by the same constitutional conviction that led courts uniformly to give civil relief.

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could not finish his prepared text (which is printed in the Record); and he never actually made the motion set forth at its end. That is why the House never took it up for discussion.

(1) To repudiate prerogative

As already indicated, the rider was a direct response to President Grant's reliance, not only upon Mansfield's posse theory, but also upon a theory of inherent executive power that had no precedent except the discredited doctrine of Lincoln's Attorney General, Edward Bates. While much of the debate focused on the "posse" use, it was repeatedly stressed that the rider prohibited not only that but also every use of the military "otherwise" for law enforcement without explicit statutory sanction. E.g., 7 CONG. REC. at 4241, col. 2, & 4245, col. 2 (Sen. Windom). A motion in the Senate to delete the words, "or otherwise," was defeated, id. at 4304-05.

While the bill was still in the House, an opponent argued that it "would prohibit the exercise of the [purported] constitutional power of the President ...." 7 CONG. REC. at 3852 col. 1 (Gardner). (Congress-

man Gardner mistakenly thought Washington had acted without statute in the Whiskey Rebellion; and he made the same unjustified leaps beyond constitutional text made by proponents of inherent executive power today. Id. at 3851-52.)

Senate proponents of prerogative did succeed in amending the bill to permit uses expressly authorized "by the Constitution or" by act of Congress, 7 CONG. REC. at 4239-40. But as Senator Edmunds quickly pointed out, id. at 4241-42, this amendment could be of no consequence if the adjective "expressly" were retained; for the Constitution nowhere "expressly" authorizes domestic use of the military without authorization by Congress.[5]

5. Discretion in fulfilling the Guaranty Clause duty, no less than in effectuating the Calling Forth clause, rests solely with Congress. See n. 1, supra. While the President is Commander in Chief, and also must see that the laws are faithfully executed, the Constitution nowhere "expressly" (or even implicitly) authorizes him to act as a military commander to enforce civil laws.

That is why Edmunds and others warned that even with this reference to arguable Constitutional authority added, the rider would allow no extrastatutory use of the military -- for protecting federal property or meeting law enforcement exigencies or even to prevent forcible ouster of the President from the White House -- so long as the word "expressly" remained. See 7 CONG. REC. at 4295-96 (Edmunds); id. at 4297, col. 2 (Matthews). If "expressly" remained, one could not justify domestic uses of the military on theories "derived

Indeed, Congress is given power to make laws for carrying into execution even the Commander in Chief power (see Art. I, Sec. 8, cl. 18) -- and the President must faithfully execute these laws.

There is some room to argue that the President has inherent power, exempt from Congress'control, with respect to foreign affairs (including use of the military abroad); but that is because international relations powers derive from practices of nations, not from our own Constitution, so that "enumerated powers" reasoning is inapplicable to Congress and President alike as to foreign affairs. See U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The notion that such presidential prerogative may be extended to the domestic sphere was laid to rest in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

by argument and inference" from the Constitution. 7 CONG. REC. at 4297, col. 2 (Matthews); id. at 4242, col. 1-2 (Hoar).

Senator Teller therefore moved to strike the word "expressly," 7 CONG. REC. at 4296, col. 1; and the Senate passed the motion, id. at 4302, col. 1. The Senators knew that this eviscerated the rider, making it merely a "truism." See id. at 4297, col. 2 (Matthews); id. at 4301, col. 1 (Bayard).

The House, however, would not see the rider neutralized. The House conferees insisted upon reinsertion of "expressly," as well as reinsertion of the Senate-stricken penalty clause. In the end, the Senate yielded; and the measure as finally enacted does contain these critical terms.

Consequently the Act does not state a truism at all. Instead, as the comments by opposing Senators referenced above concede, it forbids not only Mansfield's posse practice, but every conceivable theory of pre-

rogative or inherent extrastatutory executive authority to make domestic use of the military, including those of Attorney General Bates and President Grant.

The Act aimed to ensure that even

> the President would have no right to use the Army ... of the United States unless under authority of some act of Congress.

Id. at 3851, col. 2 (Congressman Tucker). As finally approved by both houses with the word "expressly" restored, the Act was

> opposed to leaving it so that any Attorney General, under the general authority of the President to see that the laws are executed, may say that he can use the military against the citizen ... at all.

Id. at 4242, col. 2. The extra words, "by the Constitution or," added nothing: As a House Judiciary Committee Report would observe a century later, in 1981:

> The [Posse Comitatus] Act permits Constitutional exceptions. However, there are none.

H.R. REP. 91-71, Part II, at 6 n. 3 (1981).

(2) To supplement civil redress

Both proponents and opponents of the Posse Comitatus Act understood that what it made criminal already was contrary to law. Immediately when the rider was proposed, a point of order was raised under a House rule against amending appropriation bills so as to "chang[e] existing law." Congressman Knott answered:

> Even without this amendment it will be unlawful for an officer of the United States to use any portion of troops under the pretext of enforcing the law unless he is expressly authorized so to do by an act of Congress.

7 CONG. REC. at 3845, col. 2. The penal sanction (and the fiscal restriction originally included) were new, but the substantive prohibition, he insisted, was not. The Chair agreed, rejecting the point of order because the rider

> merely recites what is the existing law ..., and it is therefore but a reenactment of what the law now is ....

Id. at 3846, col 2.

Of course it was not already a crime; but as the members of Congress knew, injuries resulting from such use of the military always had been actionable at law, even if the facts otherwise showed justification, merely because the military was employed.

> The effect of the [Knott] amendment will be to make him [who acts contrary to it] liable penally as he is now civilly for violation of the law.

Id. at 3851, col. 1 (Herbert). In fact, one argument made in the Senate against the rider was that superadding the criminal penalty was unnecessary because

> [i]f any officer of the Government, high or low, from the President down, has in the past or shall in the future undertake to use the military power of the country for any purpose not declared and authorized and justified by the law of the land, the remedy is ample on suit brought by the citizen against the trespasser, military officer, high officer of the Government, or otherwise ....

Id. at 4243, col. 1 (Hoar).

There was ample reason for Congress' awareness of the civil actionability of what they were making a crime; for a notable case of that kind was then awaiting action for the second time in the Supreme Court. Andrew Bean had sued two military officers for damages for seizing him in Vermont in 1864. Their defense was that they did so under authority and by order of President Lincoln, Commander in Chief, and under military rules which they were bound to obey. But the Supreme Court had held this defense insufficient in Bean v. Beckwith, 18 Wall. (85 U.S.) 510 (1874), and remanded the case. At the trial, Bean took verdict and judgment for the then tidy sum of $15,000; and while Congress debated and enacted the Posse Comitatus Act, the defendants' writ of error in this publicized case lay pending the Supreme Court's October, 1878 Term.

Long before the decision in January the next year, Beckwith v. Bean, 98 U.S. 266 (1878), had brought to the center of current awareness the rule of per se liability for injuries done by domestic law enforcement use of the military, applied earlier in such cases as Smith v. Shaw, McConnell v. Hampton, Johnson v. Jones, McCall v. McDowell, and Milligan v. Hovey, discussed supra at 49-51. It could not have escaped notice by any interested lawyer or legislator at that time that in every reported case brought by persons claiming injury from such "otherwise" use of the military for law enforcement, the courts had acknowledged a cause of action, and had awarded damages against the responsible military or civilian officials whenever sought.

When at last Beckwith was decided, the consistent rule of the cases once again was confirmed. Because those defendants were soldiers acting in a State that was not in

rebellion (even though the nation was embroiled in civil war), evidence of good faith and probable cause to believe that Bean was guilty of criminally interfering with military enlistment was held not admissible in justification at all. This evidence would have justified civil officers in doing exactly what those defendants had done; but the defense was denied them, solely because (except in rebellion) the military must not execute the laws.

No Justice maintained the contrary, although a majority held the evidence should have been admitted in mitigation (not in justification), and therefore remanded for a new trial.[6] Justice Field (who had written the earlier Bean opinion), joined by Justice Clifford, wrote separately at great length -- canvassing legal history to the time of Magna Carta, recalling that such military seizures violate due process, and insisting that evidence of good faith and probable cause should therefore be inadmissible even in mitigation. 98 U.S. at 285.

6. It is significant that the remand was for a new trial, because an 1863 statute granted immunity from suit to soldiers so acting. Had the immunity statute been deemed constitutional, the order should have been for abatement rather than for new trial. The majority declined to discuss that statute (which had been pointedly disregarded in McCall v. McDowell, Milligan v. Hovey, and Griffin v. Wilcox, supra), because it had not been briefed or argued.

(3) To affirm constitutional law

Members of the 1878 Congress understood that the rule limiting domestic use of the military has constitutional stature; and they alluded particularly to the Due Process clause. Congressman Knott said:

> The amendment I propose ... reaches from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land. ... It is a question that rises above party. It is a question that addresses itself to conservative men, whether upon the other side of the House or this.

7 CONG. REC. at 3847, col. 2 (emphasis added). Congressman Mills added:

> A lieutenant or a major or any other officer of the Army cannot ... employ the force under his command to aid a marshal in executing the laws without violating those guarantees which the Constitution provides for the protection of life, liberty, and property.

Id. at 3849, col. 2 (emphasis added). See also the statement of Senator Merrimon, quoted infra at 69. Indeed, nothing short of constitutional conviction could explain the per se rule of civil liability.

Of course, when a seizure violates Due Process it obviously is unreasonable for purposes of the Fourth Amendment: Surely the Solicitor does not pretend otherwise. He therefore is quite wrong to deny that the "history and purpose" of the Posse Comitatus Act make it a "benchmark of reasonableness under the Fourth Amendment." See Pet. Br. at 30.

III.C. The Complete Constitutional Rule Binds Even Congress

During debate on the "Posse Comitatus" rider, Senator Merrimon pointed out that

the complete constitutional rule limits even what Congress can do in authorizing domestic use of the military:

> ... I undertake to say that Congress has no power to invest the marshal with authority to use the Army to enforce the process of the law ....
>
> The fact that statutes have been passed that authorize or seem to authorize it does not necessarily imply that they harmonize with the Constitution. Such statutes, if they are made, are void. It was never known, never contended for in this country, until the dangerous and troublesome times that we have fallen upon of late, that such power was claimed or exercised. The Army, under the Constitution, is not to be used for the purpose of executing the law in the ordinary sense of executing the law. It can only be called into active service for the purpose of suppressing insurrection, where there is organized resistance against the Government in the execution of the law, and then ... the forms of the law must be strictly observed, as they were ... when the Army was used to suppress the whiskey insurrection in Western Pennsylvania. ...

7 CONG.REC. at 4243, col. 2 (emphasis added). The occasion for this statement was an attempt to embarrass Merrimon with the variety of circumstances in which statutes

then relatively recent did authorize domestic use of the military.

It should not be surprising that during the War and Reconstruction even Congress had gone beyond constitutional bounds. There had been confusion over what the Constitution allowed since Attorney General Cushing's endorsement of the Mansfield posse theory in 1854. The confusion had been aggravated by contradictory extremes under Buchanan and Lincoln, and inflamed by passion during and after the War. Only in the judiciary was reason kept intact.

The Government's response to the Confederate insurrection conformed to Section 2 of the 1795 Act, supplemented by that of 1807, see supra at 29-30, 33-4. Prize Cases, 2 Bl. (67 U.S.) 635, 668 (1863). But that Section, carefully crafted in 1792 and again after the Whiskey Rebellion, was radically changed after the Civil War began. The reference to marshals and the posse was

eliminated; the distinction between rebellion and other events was removed; and instead of requiring "combinations too powerful to be suppressed" by civilian means, the section authorized use of the military "whenever ... it shall become impracticable, in the judgment of the President," to rely on civilian means to enforce federal laws. Act of July 29, 1861, ch. 25, 12 Stat. 281 (emphasis added). In effect, discretion displaced the rebellion prerequisite. Only as thus emaciated does a shadow of the old statute now survive as 10 U.S.C. 332. No Court ever has considered the grave constitutional question posed by this statute in its present form.

Once the War was over, the Radicals, unchallenged in Congress, were very slow to scabbard the sword. After Johnson's veto of the February, 1866 Freedmen's Bureau bill that promised trial by martial law for anyone accused of infringing a freedman's

rights, a second Freedmen's Bureau bill was enacted over Johnson's veto. Act of July 16, 1866, ch. 200, 14 Stat. 173. Only slightly more moderate, it also provided for some military enforcement of freedmens' rights. Meanwhile, again over Johnson's veto, Congress enacted the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27. That mostly beneficent law was marred by two sections, 5 and 9, calling for enforcement by the military.

Ten months later, long after federal civil authority was fully restored, the Radical Congress enacted the Military Reconstruction Act of March 2, 1867, ch. 153, 14 Stat. 428, which grouped the vanquished States into military districts to be governed under martial law. Sure that the Commander in Chief over whose veto it had passed would not implement this affront to the Constitution, Congress decreed that all orders regarding military operations would

be void, even if issued by the President, unless issued through the "General of the Army" -- whom they immunized from removal or relief of command except with Senate approval. Act of March 2, 1867, ch. 170, sec. 2, 14 Stat. 486-87. "General of the Army" was a rank created for a sole incumbent seven months earlier, by the Act of July 25, 1866, ch. 232, 14 Stat. 223. Grant was the incumbent, and the March 2, 1867 Act effectively gave him command of Reconstruction free of presidential control.

Grant's Reconstruction army had some 20,000 soldiers, supplemented by upstart "militia" organized by military district commanders after Congress had declared the States' formal militia disbanded. Act of March 2, 1867, ch. 170, sec. 6, 14 Stat. at 487. With these forces he ousted thousands of local officials and six governors, set aside or modified legislation by military

decree, and purged the legislatures of at least three States.

No one today seriously maintains that any of this squared with the Constitution. General Grant himself said of the Reconstruction legislation:

> Much of it, no doubt, was unconstitutional; but it was hoped that the laws enacted would serve their purpose before the question of constitutionality could be submitted to the judiciary and a decision obtained.

Quoted in MORISON, COMMAGER & LEUCHTENBURG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 344 (1977). The legislation contravened the principles affirmed just a few months earlier in Ex parte Milligan, supra. Elements of the scheme were judicially denounced as unconstitutional; see, e.g., In re Egan, 8 Fed. Cas. 367 (C.C.N.D.N.Y. 1866); McLaughlin v. Green, 50 Miss. 453, 461 (1874). Congress tried to forestall further embarrassment by the concientious judiciary with its Act of March 2, 1867,

ch. 155, 14 Stat. 432, purporting to divest relevant jurisdiction from all courts, both federal and state (an Act duly ignored by state and federal courts alike), and with such manipulations as that described in Ex parte McCardle, 7 Wall. (74 U.S.) 506 (1869).

Still unrelenting, Congress passed the Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140 (later repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36). Sections 10 and 13 of the 1870 Act authorized using the military to enforce certain rights. The next year, Congress enacted the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13. Section 3 of that Act authorized federal military intervention in any state which failed or refused to protect constitutional rights. This survives, as subsequently amended, as 10 U.S.C. 333. The constitutionality of this statute, which ignores the essential distinction between

"insurrection" and all other disobedience to law, never has been tested in any court.

Only against this background can one appreciate the boldness of Senator Merrimon's statement quoted supra at 69. Merrimon had courage enough to assert that Congress itself, by such laws as the foregoing made in "the dangerous and troublesome times that we have fallen upon of late," transgressed the bounds of the Constitution by authorizing domestic uses of the military theretofore "never known, never contended for in this country." He dared to affirm the complete constitutional rule that the military

> can only be called into active [domestic] service for the purpose of suppressing insurrection, where there is organized resistance against the Government ...,

as in the Whiskey Rebellion.

But perhaps it was not for lack of courage that other conservative Senators and Congressmen held back. The tide had just

begun to turn against Reconstruction excesses, and several who had engineered that dubious military enterprise still had prestige and large followings in both houses. A measure denouncing as unconstitutional what Congress itself had done a decade or less earlier (albeit a Radical Congress lacking representation from several States) probably could not have passed.

Many of the Knott rider's supporters might therefore have thought it better to target a partial success than to guarantee heroic failure. Vindication of the complete constitutional rule might abide some other day, if meanwhile such military uses as lacked even Congress' assent could be curtailed. That would be an important victory; for much of the struggle in England from Magna Carta to the 1689 Bill of Rights had been to gain legislative control over claimed prerogatives of the Crown, including the use of military means within the

realm. It thus might have been pragmatic savvy that led the rider's supporters to stress they were leaving all statutory authorizations intact.

Whether it was all that they wanted or all they could get, the Posse Comitatus Act had great immediate and long-term effects. The Army "posse" practice ended permanently. See 16 Op. A.G. 162 (1878); 17 id. 71 & 242 (1881) and 333 (1882); 19 id. 293 & 368 (1889). Extrastatutory law enforcement use "otherwise" ended for over ninety years. Only since 1970 has disobedience to the Act become substantial. See Major Meeks' article, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act," 70 MIL. L. REV. 83, 110-24 (1975). Col. Rice, "New Laws and Insights Encircle the Posse Comitatus Act," 104 MIL. L. REV. 109, at 111-12 (1984), also notes that the change occurred around 1970.

However, there are some unhappy consequences of the Act's failure to affirm the complete constitutional rule. These make the shortfall regretable even if necessitated by political realities of that time.

First, the Posse Comitatus Act did leave untouched the Civil War and Reconstruction statutes, which disregard the difference between insurrection and ordinary civil disorder. Every lay and legal dictionary of the English language defines "insurrection" to mean rebellion. That is how the word was used throughout the historical development of legal limits on domestic use of the military: It means domestic war, constituting treason; see supra at 18-9, 28-35. Because dissimilar terms are commingled in the statutes surviving from the Radical era, however, the executive today assumes that "insurrection" in the relevant statutes means no more than civil disorder.

Another unhappy consequence is the miscellany of narrowly specialized express authorizations created by subsequent statutes. Whether characterized as "historical accident" or rationally explained, these various exceptions -- although minor even in cumulative effect -- tempt the Solicitor to characterize the Posse Comitatus Act falsely as "hit-and-miss." Pet. Br. at 21.

The worst consequence of the shortfall of the Posse Comitatus Act, however, is that it lends credibility to the view that the limitations on law enforcement use of the military are merely statutory, and not constitutional. Unless the historical record set forth in this brief is ignored, however, that view is unsustainable.

IV. REVERSING THE HOLDING BELOW WOULD FRUSTRATE THE POLICY OF THE CONSTITUTION AND CONGRESS

IV.A. Illegal Use Of the Military Has Been Increasing Since 1970

There was no substantial domestic law enforcement use of the military without express statutory authority between the enactent of the Posse Comitatus Act and about 1970. See supra at 78. When the military was used -- whether to enforce desegregation, to subdue labor riots, or otherwise to restore order -- statutory authority was always relied upon. Some of the statutes might have been unconstitutional, or misconstrued, or unconstitutionally applied; no litigation ever tested any of those points. No one pretended, however, that statutory authority was unnecessary.

Major Furman has documented that according to the many relevant Judge Advocate General Opinions as of 1960 it was settled beyond controversy that the slightest use

of military personnel to aid in law enforcement was unlawful unless expressly authorized by statute. There was some dispute over loaning equipment totally without personnel, although often that was allowed. See Furman, "Restrictions Upon Use Of the Army Imposed By the Posse Comitatus Act," 7 MIL. L. REV. 85 (1960); e.g., p. 124. This was established and adhered to in practice for decades before the search use of a helicopter with its Air Force crew was held unlawful in Wrynn v. U.S., 200 F.Supp. 457 (E.D.N.Y. 1961). Aberrations occurred only when no prior inquiry was made of a competent Staff Judge Advocate.

Not only the technical reach of the Posse Comitatus Act, but also the constitutional policy underlying it, was understood and respected. The Act on its face was confined to the Army only because the rider was to an Army appropriation act; including the Navy was not germane under House proce-

dures. Because of the underlying policy, however, the Act was amended to specify the Air Force when it was split off from the Army. For the same reason, an equivalent prohibition was made applicable to the Navy and Marines by regulation. See U.S. v. Walden, 490 F.2d 372, 374-5 (4th Cir.1974), cert. denied, 416 U.S. 983, reh. denied, 417 U.S. 977. (The Solicitor used Walden in his Petition, but omits it from his Brief. Perhaps he now realizes that it supports Respondents.)

Until 1971, Even DoD's "Civil Disturbance Regulations" recited the constitutional policy, saying:

> Although the Navy and Marine Corps are not expressly included within its provisions, the [Posse Comitatus] act is regarded as national policy applicable to all military services of the United States.

32 C.F.R. 187.4(b) (1970). Those earlier Civil Disturbance Regulations made no claim

whatever to inherent, extrastatutory executive authority. While they recited that

> [t]he Constitution ... and ... statutes provide authority to the President to utilize Federal armed forces ... in cases of ... civil disturbances

every subheading under that general recital cited an authorizing statute. 32 C.F.R. 187.4(c) (1970).

On August 19, 1971, however, those prior Regulations were cancelled and replaced by a new DoD Directive 3025.12. Notice of the cancellation was published ten weeks later, 36 Fed. Reg. 21339 (Nov. 6, 1971); and with minor changes the new Directive itself was published in Regulation form the next year. 37 Fed. Reg. 3637 (Feb. 18, 1972). These new "Civil Disturbance Regulations" are referred to herein as the "1972 Regulations." They remain in force as 32 C.F.R. Part 215.

The 1972 Regulations pointedly omit any endorsement of the policy behind the Posse Comitatus Act. Instead, for the first time

since the Grant administration, they assert executive prerogative to use the military for law enforcement without statutory authorization or restraint. 32 C.F.R. 215.4(c)(1). Although the new Regulations claim that this prerogative is established by the Constitution so that "the Posse Comitatus Act prohibition does not apply," the prerogative is described in broad and undefined terms with no attempt to identify even implicit, let alone "express," constitutional support. (Sec. 215.5 goes so far as to declare that in certain circumstances outside any statute, inferior officials may call military aid without the President!)

These 1972 Regulations were drawn under the supervision of the DoD General Counsel (former Defendant herein, Buzhardt, since deceased), with the assistance, respondents believe, of Petitioners Kleindienst and [redacted]. These lawyers all were responsible

for knowing the established law that their new Regulations disregarded.

Under the 1972 Regulations, specifically 32 C.F.R. 215.8(b), a "Directorate of Military Support" (DoMS) was created in the Pentagon, staffed by military personnel. Petitioner Gen. Gleszer was DoMS Director. Petitioner Gen. Edwards was DoMS Deputy Director. DoMS is to operate in conjunction with the "Civil Disturbance Steering Committee," sec. 215.8(a), of which the Under Secretary of the Army (Petitioner Belieu, when this case arose) is Chair. The Committee's other members include the Deputy Attorney General (then Petitioner Sneed), the Army Vice Chief of Staff (then Petitioner Haig), and the General Counsel of DoD (then Buzhardt).

The sole function of DoMS is to "plan, coordinate, and direct civil disturbance operations." 32 C.F.R. 215.8(b). The function of the Civil Disturbance Steering

Committee is to "provide advice and assistance ... concerning civil disturbance matters." Id., subsection (a). The military assistance in planning, coordinating, and directing the activities which injured these Respondents was initiated through DoMS and this Civil Disturbance Steering Committee.

It is not public knowledge on what other occasions DoMS and the Committee might have been employed; even at Wounded Knee their involvement was kept secret. However, some functions under the 1972 Regulations are ongoing. See, e.g., 32 C.F.R. 215.6(a)(8)-(10), (13), and (e).

In any event, the 1972 Regulations are only one example of the new militarism in federal law enforcement. Another was the undercover use of marines at Quantico, Virginia, giving rise to the Walden case, supra. The Fourth Circuit in Walden declined to apply the exclusionary rule only because

it considered use of the military for civil law enforcement unprecedented and unlikely to recur. See 490 F.2d at 377. But now such use has become commonplace. Major Meeks in his 1975 "Illegal Law Enforcement" article, supra, documented instances only to that date. Since then the practice has escalated, and related litigation has mushroomed. The Solicitor cites a few of these cases. Pet. Br. at 19 n. 12. We noted the resulting splay of judicial opinion, including some decisions applying the Fourth Amendment and the exclusionary rule, on pp. 38-39 and 45-50 of our Brief Opposing the Petition.

IV.B. Use Of the Military For Law Enforcement Is Unnecessary and Counterproductive

More than mere idealism accounts for the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," Laird v. Tatum, 408 U.S. 1, 15 (1972), and their "suspicion and skepti-

cism" toward invocation of military aid, Scheuer v. Rhodes, 416 U.S. 232, 246 (1974). Use of the military for law enforcement interferes with essential defense functions, and also is counterproductive.

Just six years ago, DoD General Counsel William H. Taft IV declared that the following statement (which he quoted from a Deputy Assistant Attorney General, Office of Legal Counsel) "set[s] forth the views of the Departments of Defense and Justice:"

> The [Posse Comitatus] Act expresses one of the clearest political traditions in Anglo-American history: that using military power to enforce the civilian law is harmful to both civilian and military interests. ... They knew ... that military involvement in civilian affairs consumed resources needed for national defense and drew the Armed Forces into political and legal quarrels that could only harm their ability to defend the country. ...

Hearing on H.R. 3519, Subcomm. on Crime, House Comm. on Judiciary, 97th Cong., 1st Sess., at 16 (1981). (For the original of the statement, made in a 1979 letter sent

with other documents in 1980 from the White House to Congressman Lester Wolff, see id. at 99.)[7]

Domestic use of the military causes more problems than it solves, inflaming passions that rather need cooling. One need only recall the 1960's and 1970's when, at Kent State and elsewhere, the appearance of the military by itself pushed disorder over the edge of violence. The marshal and district attorney in Boston in 1854 sought aid from the mayor because they anticipated just such public reaction to the "posse" of soldiers they were using. Supra at 43. General Halleck reported the same phenomenon during Reconstruction. See 7 CONG. REC. at 3582, col. 1, and 3849, col. 2. In

7. It seems impossible to reconcile this statement from DoJ's Office of Legal Counsel -- endorsed by DoD's General Counsel, and passed on by the White House -- with the Solicitor's assertion here that the Posse Comitatus Act "does nothing more than allocate law enforcement responsibility among different agencies." Pet. Br. at 17.

fact, the virulent racism which suppressed civil rights for a century had among its causes the use of upstart "militia" to help Union soldiers press Radical Reconstruction upon the South, see supra at 73. Those hated "militia" were all Black.

There is no danger of law and order being lost if military intervention is saved only for actual rebellion. Now, no less than when Hamilton wrote THE FEDERALIST Nos. 27 & 29, supra at 23-24, the Necessary and Proper Clause gives Congress ample power to ensure civil quiet and obedience without recourse to military means.[8]

8. The possibilities are limited only by Congress' imagination. The Constitution forbids only the military expedient. The U.S. Marshals' Service, or some specialized part of it like the Special Operations Group (SOG), could be used. For more manpower, the FBI and other police-trained agents like DEA, ATF, IRS Criminal Division, and Coast Guard, could be employed. (Both SOG and FBI were used at Wounded Knee.) A special, new federal civil police force could be created. Objections to a national police, for such limited purposes, pale beside the military option.

Alternatively, on Hamilton's reasoning in THE FEDERALIST No. 27, supra, Congress could provide for "federalizing" some State police resources

IV.C. Petitioners Had No Legal Authority For Their Use Of the Military Injuring Respondents

To accomplish the injuries alleged by these Respondents, Petitioners employed scores of Army and Air Force personnel, in addition to the enormous array of materiel detailed at J.A. 45-50. Some personnel were used both on and off-site to design and implement strategy and tactics for the operation, and to supervise and command. J.A. 6, 18-19. Others were used on-site to manage communications, intelligence, and logistics essential to the operation. J.A. 6-7. Others were used actually to operate, and still others to maintain, much of the military equipment used. J.A. 7-8, 9-10.

At the time this occured, the consistent course of JAG opinions (see Major Furman's article, supra) and judicial authority (see Wrynn, supra) maintained that such uses of

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for use, even outside their home States, as exigencies arise. Also, without doubt Congress could prescribe a system for interstate lending or sharing of police; cf. the existing interstate forest fire compacts.

the military to help in civil law enforcement were felonies under the Posse Comitatus Act. No authority existed to the contrary. There was only the bald claim of executive prerogative made in the 1972 Regulations -- and every comparable claim in our history had been flatly repudiated. The claim of Bates and Lincoln was repudiated judicially, and the claim of Grant was repudiated by Congress.

Nine years after the facts of the present case had occurred, by Title IX of the DoD Authorization Act of 1982 (now codified as 10 U.S.C. 371-78), Congress did approve the lending of certain military equipment, and even authorized military personnel to train civilians in its use. 10 U.S.C. 372, 373. The Solicitor discusses this 1982 Act at Pet. Br. 26-30. He fails however, to notice its real significance for this case.

The significance of the 1982 Act is that, in the course of enacting it, Con-

gress carefully and emphatically reaffirmed the long-established view of the Posse Comitatus Act under which even "passive" uses of the military are felonious.

Although Congress authorized equipment loans, it refused to let military personnel operate such equipment except when used "outside the land area of the United States" or for monitoring air or sea traffic. Even under these constraints, operation by military personnel was allowed only in connection with enforcement of a few specified immigration, drug, and customs laws. 10 U.S.C. 374. Even more significant, Congress refused even to let military personnel maintain equipment loaned for enforcing any other laws! Id.

This congressional restraint was no accident. The House Judiciary Committee

> found that only in the area of drug law enforcement had a strong enough argument been made to support even the passive use of military personnel to operate and maintain equipment on loan to civilians.

H.R. REP. 97-71, Part II, at 11 (1981) (emphasis added). The Committee stressed that it was making only

> a modest and conditional departure from the current strictures of the Posse Comitatus Act. ... In light of the historical and policy considerations behind the Posse Comitatus Act, this section is to be construed narrowly. See 18 U.S.C. 1385 (exceptions to the Act must be "expressed").

Id. at 12 (emphasis added).

Associate Attorney General Rudolph W. Guiliani repeatedly urged that the bill's wording be changed to allow the military just to maintain (not even to operate) equipment loaned for enforcing any laws. See Hearing on H.R. 3519, supra, at 81-2 & 84-5. But all Congress would do was expand its authorization for "passive" use ever so slightly, so as to include certain customs and immigration as well as drug laws -- but no others. For any but those few specified laws, Congress affirmed that "the current

strictures" of the Posse Comitatus Act -- i.e., those applicable when this case arose -- prohibit "even the passive use of military personnel to operate and maintain[9] equipment on loan to civilians."

In other words, the significance of the 1982 Act for purposes of the case at bar is that it confirms Respondents' contention that even the arguably "passive" uses alleged in this case (e.g., equipment maintenance, and aircraft operation for transportation and surveillance) were illegal at

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9. In 1981, DoJ claimed that maintenance of loaned equipment by military personnel did not violate the Posse Comitatus Act anyway. See letter of Assistant Attorney General McConnell, Hearing on H.R. 3519, supra, at 70. That claim was contradicted by previous practice and by the JAG Opinions recounted by Major Furman in his 1960 article, supra. But the claim did reflect the new practices that had grown up since the change of executive branch policy, illustrated by the 1971 Directive and the 1972 Regulations incorporating it. Of the numerous documents placed in the Hearing record to buttress DoJ's claim that loans of maintenance personnel accompanying equipment were "established practice," none antedated 1971! See Hearings on H.R. 3519, supra. Congress' 1982 Act repudiated the DoJ view. See supra at 94-6.

the time, in 1973. (The 1982 Act in no way softened the prohibition as to military involvement in strategic planning, on-site logistics management, or command, all of which also are alleged in this case.)

It is interesting that, while the mechanisms and procedures employed for the military involvement at Wounded Knee were those established under the 1972 Regulations, Petitioners never have pretended that this incident came within the executive power that those Regulations assert, 32 U.S.C. 215.4(c) (1)(i) and (ii). Perhaps that is because they know that DoMS' "Concept Paper" on the incident, prepared for Petitioner Gen. Gleszer by Col. Frank D. Oblinger of the DoMS staff, on the basis of analyses by Petitioner Gen. Hay and Petitioner Gen. (then Col.) Warner, declared among the "basic premises" of the "Federal military support of the on-going operations at Wounded Knee, SD," that

> d. The Indians do not appear intent upon inflicting bodily harm upon the legitimate residents of Wounded Knee nor upon the Federal law enforcement agents operating in the area ....
>
> e. Because of its isolated geographical location, the seizure and holding of Wounded Knee [by Indians seeking media attention] poses no threat to the Nation, the State of South Dakota or the Pine Ridge Indian Reservation itself. However, it is conceded that this act is a source of irritation if not embarrassment to the Administration in general and the Department of Justice in particular.

Claims of inherent executive prerogative aside, certainly none of the statutory authorizations mentioned by the Solicitor, Pet. Br. at 21-25, was applicable; and neither was any other. In fact, at no time in this litigation have Petitioners seriously maintained that any statutory authorization applied.[10] They have been content to argue

0. 10 U.S.C. 3500 and 8500 authorize use of federalized National Guard "to execute the laws" only when "the President is unable with the regular forces" to do so. The precondition is obvious: Some authority to use regulars must first exist. Thus, these Guard statutes do not independently authorize anything; nor could they, because they

that even if they acted without statutory

specify no "cases" or "circumstances expressly authorized ...," as the Posse Comitatus Act requires. (In any event, fifteen named and more unnamed regular Army and Air Force personnel were used here, in addition to federalized Guardsmen.)

In a Supplemental Brief on Rehearing below, Respondents grasped the straw of 25 U.S.C. 180. That statute "was ... intended ... to prevent white men from settling and surveying" Indian lands, U.S. v. Lewis, 5 Indian Terr. Rep. 1, 76 S.W. 299 (1903) (emphasis added). Furthermore, 25 U.S.C. 180 applies only to settlements on lands secured "by treaty," see Robinson v. Caldwell, 67 Fed. 391, 395 (9th Cir. 1895), app. dism., 165 U.S. 359 (1897). The last treaty with the Sioux, ratified in 1869 (see 1 S.D.C.L. 105) gave them all of present South Dakota west of the Missiouri. Congress abolished Indian treaty-making power in 1871, see 16 Stat. 566, 25 U.S.C. 71; consequently, the vast territorial reductions of 1877 and 1889 (see 1 S.D.C.L. 117 & 122), fixing the Pine Ridge Reservation at its present size, were made not by treaty, but by "agreement" superseding the earlier treaty terms. Therefore, 25 U.S.C. 180 has no application to the Pine Ridge Reservation.

Even if it applied, on its face 25 U.S.C. 180 requires direction by the President himself; see 20 Op.A.G. 245, 247 (1891). President Nixon never directed that the military be used here.

The issuance of a warrant preconditions application of 42 U.S.C. 1989, seized upon in the Rehearing Petition below; and none was issued here.

The Economy Act, 31 U.S.C. 686, does not "expressly" provide either for military use or for law enforcement. Moreover, it applies only insofar as the agencies act within their otherwise established powers. See generally 13 Op. Compt. Gen. 234, 237 (1934); 18 id. 262, 266 (1938); 23 id. 935, 937-38 (1944); 32 id. 392, 394 (1953).

authorization, the resulting injuries support no civil claim. The Solicitor now seems to offer as an additional argument, that because several statutory authorizations do exist it should not matter that none of them applies to a situation like this! The argument does merit some recognition for novelty.

IV.D. The Holding Below Should Be Broadened, Not Reversed

The Solicitor asks this Court to hold, for the first time in its history, that a seizure accomplished by felony is "reasonable" under the Fourth Amendment. The request is worse than inappropriate; on the issue in this case, it cuts at the foundation of free political institutions.

This Court recognized a civil cause of action for violations of the Fourth Amendment in Bivens v. Six Agents, 403 U.S. 388 (1971). Respondents are within the scope of that decision. Their particular claims,

however, do not need the Bivens rationale, and would be actionable even if Bivens were overruled: Claims for injuries from unlawful use of the military in civil law enforcement have been actionable both in state and in federal courts since our nation's origin. See supra at 49-51, 64-7.

Furthermore, Respondents do not ask that a civil cause of action be inferred from a criminal statute. Actions like theirs were familiar long before the Posse Comitatus Act existed, and there is no indication whatever that when Congress added the criminal penalty it intended to abolish the tradition of civil relief.

The Court of Appeals made no mistake in holding that Respondents state an actionable claim. It did err, however, in confining the scope of Respondents' claims as it did. Moreover, in view of the historic vigor, clarity, and importance of the constitutional principles involved, this

error is "plain error" within this Court's Rule 34.1(a).

The Court of Appeals resorted to its own prior holding in U.S. v. Casper, 541 F.2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970, for a supposed distinction between "indirect or passive military involvement" and the kind that is unlawful. It is not clear just how this distinction would apply to several of the acts alleged in this case.[11]

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11. District Judges Nichol, Urbom, Bogue, and VanSickle had adopted varying constructions of the Posse Comitatus Act in criminal cases: U.S. v. Banks, 383 F.Supp 368 (D.S.D. 1974) (Nichol); U.S. v. Jaramillo, 380 F.Supp. 1375 (D. Neb. 1974) (Urbom), app. dism., 510 F.2d 808 (8th Cir.1975); U.S. v. Red Feather, 392 F.Supp. 916 (D.S.D.1975) (Bogue); U.S. v. McArthur, 419 F.Supp. 186 (D.N.D. 1975) (VanSickle). (Casper was the Eighth Circuit review of McArthur.) Urbom, Bogue, and VanSickle each restricted the Act to what he considered a reasonable scope; but they differed.
Judge VanSickle noted in McArthur that his holding would be the same whether he used Urbom's formulation or his own. In Casper, which affirmed VanSickle's holding, the Eighth Circuit did not say whether it preferred VanSickle's construction, or Urbom's, or yet another of its own. But in any event, none of those competing constructions has any other basis than ignorance of the JAG Opinions on point, and determination to escape giving literal effect to the Act.
Other Circuit and District Courts have since deepened this quagmire of jurisprudence by trying to make sense of the Casper, McArthur, Jaramillo, and Red Feather theories in other contexts.
Congress was made fully aware of this judicial cacophany in 1981, see Hearing on H.R. 3519, supra, at 10 and notes 1-5; H.R. Rep. 97-71, Part II, at 5-6 (1981). Congress' response was clear and firm: it refused to credit any of these judicial attempts at dilution, insisting instead that even such manifestly "passive" uses as maintenance of loaned equipment be confined to enforcement of a handful of specified laws, see supra at 94-6.

Although similar to "tests" that other courts since have tried, Casper's approach has no historical or JAG Opinion precedent. The definitive objection to it, however, is that Congress in 1982 denounced all such judicial attempts to dilute the "current strictures" of the Posse Comitatus Act, which Congress insists prohibits "even the passive use of military personnel" to execute any but a handful of specified laws. Supra at 94-95. With no authority and no good reason to support it, this approach should be repudiated by this Court as plainly erroneous.

The court below also erred in denying those claims of Respondents which rest on the Fifth rather than the Fourth Amendment. See Petit. at 30a. The court believed that "all of the proof relevant under such a theory will still come in if and when the Fourth Amendment search-and-seizure theory goes to trial." Petit. at 32a. Actually, however, denying Respondents' Fifth Amendment claims may foreclose recovery for several of the injuries alleged. See J.A. 5-6 & 10-12, paragraphs 20 (c) & (d), 21, 30, 31, and 32. Respondents' Due Process rationale is so overwhelmingly supported by the American and English authorities that this ruling of the Court of Appeals also is plainly erroneous.

Conclusion

The Court should confirm the complete constitutional rule limiting domestic law enforcement use of the military: No such use may be made, or authorized by Congress,

except in circumstances tantamount to internal war. Applying this rule, Respondents are entitled to relief for all of their injuries, under the Fifth or the Fourth Amendment, regardless whether those injuries would have been actionable had no military been used.

Alternatively, the Court should hold that no domestic use of the military may be made (except in circumstances tantamount to internal war) without express authorization by Congress, not just because of the Posse Comitatus Act but because of the Constitution. Applying this rule, Respondents are entitled to relief for all of their injuries, under the Fifth or the Fourth Amendment, regardless whether those injuries would have been actionable had no military been used.

As a third alternative, the Court should affirm the judgment below based on the Fourth Amendment, but broaden it by holding

that neither the Constitution nor the Posse Comitatus Act distinguishes between "passive" and other uses not expressly authorized by Congress. Applying this rule, Respondents are entitled to relief for their confinement, regardless whether that confinement would have been actionable had no military been used, even if the only unlawful use made of the military was "passive."

At the very least, the Court should affirm the judgment below on the rationale employed by the majority below.

Respectfully submitted,

DAVID E. ENGDAHL, Counsel of Record for Respondents
31723-A 48th Lane S.W.
Federal Way, WA 98023
(206) 591-2245

KENNETH E. TILSEN
2220 American National Bank Building
Fifth & Minnesota Sts.
St. Paul, MN 55101
(612) 224-7687

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REPLY

BRIEF

(6)

No. 86-987

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXANDER HAIG, ET AL., PETITIONERS

v.

GLADYS BISSONETTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

BARBARA L. HERWIG
SCOTT MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

23 pp

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Introduction

This is a case about the meaning and application of the Fourth Amendment. The court of appeals held that an otherwise reasonable seizure becomes unreasonable under the Fourth Amendment for the simple reason that military personnel participated in its execution, in purported violation of the Posse Comitatus Act. In our opening brief, we contended that the decision of the court of appeals is flawed at every turn: (1) the reasonableness of a search or seizure under the Fourth Amendment depends upon a balancing of competing interests, and cannot be resolved by giving dispositive weight to the application of a particular statute; (2) the Posse Comitatus Act is, in any event, an improbable "guidepost by which to evaluate the reasonableness [of] * * * seizures and searches" (Pet. App. 24a); and (3) there is no reason to believe that the Fourth Amendment was intended to incorporate a set of unstated restrictions on the deployment of military personnel.

We restate these propositions to highlight how little of our argument respondents have chosen to engage. They do not dispute—indeed, they expressly decline to address (Br. 3)—this Court's many cases holding that "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion' " (*Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985), quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)). And they point to nothing in the language or history of the Fourth Amendment to support the court of appeals' unarticulated premise that the reasonableness of a seizure may depend on whether military personnel participate in its execution.

Indeed, respondents do not defend the court of appeals' reasoning at all (see Br. 3-4, 100-106), advancing instead a thesis far broader than the court of appeals was prepared to accept. They contend (*id.* at 3, 6) that under the Constitution the military may only be used in cases of "insurrection" and "rebellion"—acts that "amount[] to internal 'war' " (*id.* at 6). Respondents distinguish such acts of "internal war" from mere "disorders, mob violence, or riots," which, in their view, may not constitutionally be controlled with the assistance of military force (*ibid.*). During the Civil War decades, they assert (*id.* at 37-51), legislators and judges often lost sight of the proper limits on the use of the military, and so in order "to restore the constitutional norm" (*id.* at 51) the Congress enacted the Posse Comitatus Act. Apparently assuming that the uprising at Wounded Knee did not constitute an "insurrection," respondents therefore conclude that the use of the military to quell that disturbance violated both the Posse Comitatus Act and the Constitution (on which the Posse Comitatus Act was ostensibly based). This thesis is substantially overdrawn in at least two respects.

First, while there certainly is "a traditional and strong resistance of Americans to any military intrusion into civilian affairs" (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)), the constitutional dimensions of that tradition are not as sweeping as respondents claim. As we stated in our opening brief, there is no reason to suppose that the Fourth Amendment was intended to prohibit governmental action simply because it is undertaken by military personnel. Indeed, the text of the Constitution makes clear that the Framers anticipated that military force would sometimes be necessary to enforce the law, and they did not confine its use only to cases of domestic or foreign warfare.

Second, respondents fail to show that the Posse Comitatus Act was intended to codify or restore a constitutional limitation on the deployment of military forces. Respondents themselves complain of the "unhappy consequences of the Act's failure to affirm the complete constitutional rule" (Br. 79 (emphasis omitted)). The court of appeals, while it rejected respondents' most sweeping claims, was therefore in error in selecting that statute as a "reliable guidepost" of reasonableness under the Fourth Amendment.

A. The Constitution Does Not Restrict Military Participation In Law Enforcement Solely To Cases Involving Insurrection Or Rebellion

1. Constitutional Provisions

a. *The Fourth Amendment*

Respondents offer an elaborate historical discussion in support of the conclusion that the use of the military, without more, may result in a Fourth Amendment violation. It is especially telling, however, that respondents' lengthy narrative is devoid of any analysis of the text of the Amendment itself or of the debates surrounding its adoption. Respondents rely instead on an impressionistic survey of events during the years preceding adoption of the Bill of Rights to justify speculation that the Framers

must have shared respondents' interpretation of the Amendment (Br. 30-32).[1]

Apart from the obvious unreliability of such unmoored historical mindreading, there is a further, specific weakness in respondents' theoretical analysis of the sup-

[1] Respondents partly rely (Br. 4-11) on a collection of statutes, cases, and secondary materials, drawn from the English Common Law and spanning the period from the Magna Carta (*id.* at 7) to the American Revolution (*id.* at 8). We do not address each of those sources in detail, but note that they do not support respondents' historical thesis. For example, the Deputy Judge Advocate General of England did *not* rebuke General Gage because the military may never assist in civilian law enforcement (*id.* at 7-8); he did so because the General had subjected to military court martial certain persons who were not members of the armed forces. See Letter from Charles Gould to Thomas Gage, *reprinted in* F.Wiener, *Civilians Under Military Justice*, 254 (1767). See also *id.* at 255-256 (letter from Charles Gould to Hunter Sedgwick). Similarly, the quotations from Blackstone's *Commentaries* and Coke's *Institutes* (Br. 9) do *not* state that the military may take no role in civilian law enforcement; rather, they state that martial law is only permitted during wartime and that a killing by a soldier during a time of peace cannot be justified as an incident of martial law. See W. Blackstone, *Commentaries on the Laws of England*, Bk. I, ch. 13, at 412 (1765); E. Coke, *Institutes of the Laws of England*, Pt. 3, ch. 7, 52 (1644). Moreover, the Administration of Justice Act, 14 Geo. 3, ch. 39 (1774), simply has nothing to do with "the ancient law permitting only civilian means to suppress disorder" (Br. 8). It was, instead, an act to ensure that magistrates and those who assisted them in the execution of the laws were not tried in a hostile venue for crimes that they allegedly committed in the discharge of their duties. And the *Trial of Captain John Porteous*, 17 St. Tr. 923 (1736), was *not* a "prominent example[ ] of the application of th[e] rule" (Br. 9) prohibiting military assistance in law enforcement. Captain Porteous was tried for murder when he and the soldiers under his command fired upon an unruly mob that was attending a public hanging. The issue in dispute at trial was whether the defendant's actions were excessive, in light of the provocation by the mob. There was no dispute, however, that Captain Porteous and the other military personnel were entitled to "execute the Laws" by ensuring, with their presence, that the hanging was carried out without interference.

posed Fourth Amendment violation in this case. On those few occasions in their brief where the Fourth Amendment is actually mentioned, respondents link the Fourth Amendment to the Due Process Clause of the Fifth Amendment (Pet. 31-32, 68), as though a violation of the latter amounts necessarily to a violation of the former. No authority of any kind is offered for this leap of logic. And even if that dubious premise were accepted, respondents do not explain why the use of the military to perform law enforcement functions amounts to a violation of due process.[2]

[2] The court below flatly rejected respondents' claim that due process may be offended "by reason of the mere fact that the confinement and other deprivations inflicted upon them derived from military action instead of civilian" (Pet. App. 30a). Like *Ex parte Merryman*, 17 F. Cas. 144 (D. Md. 1861) (No. 9,487), which was discussed by the court below (Pet. App. 30a-31a), the few authorities offered by respondents to support their due process argument turn on the denial of judicial process, not on the mere involvement of the military in a law enforcement activity. *E.g.*, *Beckwith* v. *Bean*, 98 U.S. 266 (1878); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Here, by contrast, respondents rest solely on the fact that the military was involved in a law enforcement activity.

It appears, additionally, that respondents rely in this Court on a claimed due process violation, not only as a basis for their Fourth Amendment theory but also as an independent Fifth Amendment cause of action under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (Br., Question Presented). Because respondents have not cross-petitioned on that issue, however, this course is not open to them. The court of appeals explicitly rejected respondents' Fifth Amendment theory holding "that with one exception the District Court correctly ruled that the complaint failed to state a claim." It remanded for further proceedings only on the "single [Fourth Amendment] theory" (Pet. App. 32a-33a). Although a lower court judgment may be defended by asserting an alternative theory raised below in support of the judgment, even where it amounts to an attack on the reasoning of the lower court, *Thigpen* v. *Roberts*, 468 U.S. 27, 32 (1984); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), a party must cross-petition if it seeks to change a lower court judgment. *Trans World Airlines, Inc.* v. *Thurston*, 469

b. *The Calling Forth Clause*

Far from prohibiting the use of the military in the execution of the laws, the Constitution affirmatively permits it. Article I, Section, 8, Clause 15, of the United States Constitution states that Congress shall have the power:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.

The text speaks clearly and broadly. Under its plain terms, the militia may be summoned for three distinct purposes: "to execute the Laws of the Union"; to "suppress insurrections"; and to "repel invasions." The militia's mandate to "execute the laws," when appropriately "call[ed] forth," is unqualified. The text prescribes no limits at all to the kinds of laws that may be enforced with military assistance, nor on the kinds of "domestic circumstances" (Br. 6) under which the military may be summoned.

Respondents concede (Br. 12) that the Calling Forth Clause, at least "if read superficially," appears to authorize the deployment of the military "in situations short of actual rebellion." They acknowledge (*id.* at 15), moreover, that "[o]pponents of ratification took [the Clause] to mean that the military would be enforcing routine federal laws." They contend (*id.* at 15-19), however, that the phrase "to execute the Laws" should not be given its plain and usual meaning. In respondents' view, the legislative history of the Calling Forth Clause demonstrates that when the Framers gave the militia the authority to "execute the Laws," they intended that phrase to cover only "resistance to federal authority * * * by State governments"—a form of "outright rebellion [only]

U.S. 111, 119 n.14 (1985). In seeking to broaden the issues available on remand from the court of appeals, respondents plainly seek modification of the court of appeals' judgment. They may not pursue their Fifth Amendment claim in the absence of a cross-petition.

technically different from insurrection" (*id.* at 19). Respondents base this surprising interpretation on a precursor of the Calling Forth Clause, never adopted, that would have authorized the Congress " 'to call forth the force of the Union ag[ain]st any member of the union failing to fulfil its duty under the articles thereof' " (*id.* at 16).[3] In light of this earlier proposal, respondents contend (*ibid.* (emphasis omitted)), the power to "execute the Laws" in the Calling Forth Clause, as finally approved, only covered "affronts to national authority by duly constituted State governments."[4]

The language of the Clause simply cannot be confined that narrowly. To the contrary, the words of the Constitution must "be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

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[3] Respondents' reliance on this failed proposal is, of course, flawed at the start because, as the Court has observed in an analogous context, " '[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *INS* v. *Cardoza-Fonseca*, No. 85-782, slip op. 21 (Mar. 9, 1987) (citation omitted). See, *e.g.*, *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 76-77 (1946).

[4] Respondents also derive this narrow reading of the Calling Forth Clause from the fact that it was adopted shortly after the adoption of the Treason Clause (Br. 17-19). But they offer no evidence that in approving the Treason Clause the Framers ever used the phrase "to execute the Laws," or that they somehow gave it the meaning divined by the respondents. Respondents also rely (*id.* at 17, 19) on the fact that the Calling Forth Clause was adopted without even a "whisper" of dissent. That is both mistaken (see 3 *The Records of the Federal Convention of 1787*, at 172, 207-208 (M. Farrand ed. 1966) (statement of Luther Martin to the Maryland Legislature)), and irrelevant. Silence by the Framers "is just that—silence" (*Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 7), and silence in the legislative history cannot impeach the constitutional text (cf. *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 6; *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980)).

Congress was given the power to provide for calling forth the militia "to execute the laws"; and "where a power is expressly given, in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context, expressly, or by necessary implication" (*Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 326). Contemporary observors did not use the phrase "to execute the laws" to refer solely to cases of insurrection by State governments.[5] Nor does the history of the Calling Forth Clause support respondents' narrow reading of the phrase. The immediately prior version of the Clause would have authorized Congress to provide for summoning the militia "in order to execute the laws of the Union, *enforce treaties*, suppress insurrections, and repel invasions." 2 *The Records of the Federal Convention of 1787*, at 389 n.9

[5] Three days before the Calling Forth Clause was adopted, Roger Sherman, delegate from Connecticut, argued that "the States might want their Militia for defence against invasions and insurrections, and for enforcing obedience to their laws." 2 J. Madison, *Debates in the Federal Convention of 1787*, at 426 (G. Hunt & J. Scott ed. 1787). Sherman's reference to "enforcing obedience to the[ ] laws" can only be understood in the ordinary sense; plainly, it did not refer to policing the States themselves when they acted in rebellion against the federal government. Justice Story's opinion in *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820), used the phrase "to execute the Laws" in the same way. The question in that case was whether federal statutory or constitutional law preempted a Pennsylvania law that prescribed certain procedures for penalizing members of the state militia who failed to serve when called forth by the federal government. Justice Story, concluding that the state law was not in conflict with federal law, observed (18 U.S. at 54) that prior to the adoption of the Calling Forth Clause the States had always "possessed general authority over their own militia," including the power "to execute the laws of the Union, or suppress insurrections, or repel invasions • • •." Justice Story used the phrase "execution of the laws" in its ordinary sense, when he emphasized (*id.* at 55) that "the execution of the laws of the union within its territory may not be less vital to [a State's] rights and authority, than the suppression of a rebellion, or the repulse of an enemy."

(M. Farrand ed. 1966) (emphasis added). Gouverneur Morris, delegate from Pennsylvania, moved to strike the phrase "enforce treaties" because he thought it to be "superfluous" with the word "laws" in the phrase "to execute the laws." The Convention approved this deletion. *Id.* at 389-390. Plainly, if the Convention had intended the phrase "to execute the Laws" to refer only to insurrections by the States, it would not have agreed that the power "to execute the Laws" was "superfluous" with the power to "enforce treaties."

Respondents' narrow reading of the Calling Forth Clause is also deeply flawed as a practical matter. Under respondents' analysis, a governmental official, before invoking the Clause, and a judge, before upholding a particular use of military force, would have to decide whether a given domestic uprising was truly an "insurrection" or merely an act of "mob violence or riot[ ]" (Br. 6). And as exercised by courts, such exacting scrutiny is not only imprudent generally (cf. *Atlee* v. *Laird*, 347 F. Supp. 689, 705 (E.D.Pa. 1972) (three-judge court), aff'd mem., 411 U.S. 911 (1973)), but conflicts more specifically with this Court's recognition more than 100 years ago that the power to suppress insurrection under the Calling Forth Clause "is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870). Accord, *Raymond* v. *Thomas*, 91 U.S. 712, 714-715 (1875). See also *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) ("the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion").

In short, the fairest reading of the Calling Forth Clause is the one dictated by its plain terms: that the militia may be "call[ed] forth," when necessary, "to execute the laws."

Respondents' effort to cabin the Clause within a "narrower, contracted meaning" (*In re Strauss*, 197 U.S. 324, 330 (1904)), is unpersuasive.

2. Contemporaneous Events

a. *The Ratification Process*

Respondents acknowledge (Br. 20) that "the words chosen by the Framers * * * are susceptible of broader interpretations" but assert (*id.* at 22-24) that during the ratification debates, and particularly in *The Federalist*, the Framers "specifically refuted" the claim that "military execution of federal laws should be expected" (*id.* at 23). The ratification process, however, provides cold comfort to respondents' thesis. It reflects, instead, the Framers' pragmatic assumption that military force might sometimes be required to ensure the enforcement of the laws.

Hamilton's argument in The Federalist No. 28, at 179, 180 (C. Rossiter ed. 1961)—in which he urged the Nation to approve "military establishments in time of peace"—states that pragmatic approach most clearly.[6] At the outset, Hamilton observed, it "cannot be denied" that "there may happen cases in which the national government may be necessitated to resort to force." When "emergencies at any time happen under the national government, there could be no remedy but force." The degree of force, he added, "must be proportioned to the extent of the

[6] See also The Federalist No. 8, at 69,70 (A. Hamilton) (C. Rossiter ed. 1961) (expressing the hope that the "insular" geographical location of the United States will permit it to employ its military only to "aid the magistrate to suppress a small faction, or an occasional mob, or insurrection"); The Federalist No. 26, at 170 (A. Hamilton) (C. Rossiter ed. 1961) (endorsing the proposition that "no precise bounds c[an] be set to the national exigencies" under which military force might be deployed); The Federalist No. 29, at 183 (A. Hamilton) (C. Rossiter ed. 1961) ("to assist the magistrate" in the "execut[ion] [of] the laws of the Union" there is a power under the proposed Constitution "to make use of [force] when necessary").

mischief." For example, "[i]f it should be a slight commotion in a small part of a State, the militia of the residue would be adequate to its suppression." On the other hand, if an "insurrection should pervade a whole State," he said, "the employment of a different kind of force might become unavoidable." Thus, while the militia might do well for smaller disorders, "there might sometimes be a necessity to make use of a force constituted differently from the militia, to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions."[7]

Other delegates expressed similar views during the ratification debates in the various states. Charles Pinckney, delegate from South Carolina, explicitly rejected the narrow portrait of the role of the military advanced by respondents (3 *The Records of the Federal Convention of 1787, supra*, at 118):

> Independent of our being obliged to rely on the Militia as a security against Foreign Invasions or Domestic Convulsions, they are in fact the only adequate force the Union possess, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution.

Similarly, when James McHenry, delegate from Maryland, explained to the Maryland House of Delegates why the Calling Forth Clause had been approved, he stated that "[i]t was thought expedient to vest the Congress with the powers contained in this Section, which par-

[7] Respondents obviously misread this language when they derive the surprising proposition (Br. 22 (emphasis in original)) that Hamilton "stressed that recourse to the military—whether militia or regulars * * *—was *only* for 'seditions and insurrections.' "

ticular exigencies might require them to exercise * * *." In particular, he noted, the "Convention had in Contemplation the possible events of Insurrection, Invasion, and even to provide against *any disposition* that might occur hereafter in any particular State to thwart the measures of the General Government * * *." 3 *The Records of the Federal Convention of 1787, supra,* at 148 (emphasis added).[8]

b. *Early legislation*

Respondents claim (Br. 24-36) that certain statutes relating to the military, enacted by Congress soon after ratification, confirm that the "militia could be used only when civil authority was overwhelmed—and that meant insurrection" (*id.* at 27). That claim is mistaken.[9]

[8] Respondents rely (Br. 21-22) on James Madison's remarks concerning the Calling Forth Clause during the Debate in the Virginia Convention, but that reliance is misplaced. Madison was asked why Congress should be granted the power to call forth the militia to execute the laws of the Union. Madison began by stating, generally, that "[i]f resistance should be made to the execution of the laws * * * it ought to be overcome." This, he said, "could be done only two ways; either by regular forces, or by the people." A standing army was not the preferred approach, he insisted: "If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed to suppress and repel them, rather than a standing army." In order to ensure that the militia—rather than a standing army—is able to fulfill its mission, "[t]he best way [is] * * * to put the militia on a good and sure footing, and enable the government to make use of their services when necessary." 3 *The Records of the Federal Convention of 1787, supra,* at 318-319. While Madison obviously envisioned that the militia would be available in cases of insurrection or invasion, he plainly did *not* state, as respondents suggest (Br. 21-22), that the power of the militia could *only* be called forth in such cases. Rather, as the full text of his remarks makes clear, he believed that the government must be free to call upon the militia "when necessary."

[9] Moreover, even were respondents' reading of these statutes otherwise correct, a decision by Congress to grant a narrow authority to "call forth" the militia does not mean that, in doing so, it has acted at the limit of its constitutional authority.

Respondents rely principally (Br. 25-27) on the Act of May 2, 1792, ch. 28, §§ 1-3, 1 Stat. 264, which implemented the Calling Forth Clause. Section 2 of the Act, which implemented the power "to execute the laws," provided, in pertinent part:

> That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, * * * it shall be lawful for the President of the United States to call forth the militia * * * to suppress such combinations, and to cause the laws to be duly executed. * * *

This provision that the militia may be called upon to execute the laws whenever the laws are "opposed" by "combinations too powerful to be suppressed" is not easily read as limiting that use to cases of insurrection.[10] By contrast, Section 1 of the Act, 1 Stat. 264, authorizes the President to summon the militia "in case of an insurrection in any state against the government thereof," thus suggesting that Congress would have used the term "insurrection" had it intended to so limit the use of the militia under Section 2. Indeed, the Act of May 2, 1792, was entitled "An Act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and there is no reason to believe that the first category was intended to add nothing to the second.[11]

[10] Still less does Section 2 support respondents' contention (Br. 16) that the power "to execute the laws" in the Calling Forth Clause applies solely to insurrections by State governments.

[11] Even those members who favored a narrower militia bill recognized that the power "to execute the laws" with military assistance was firmly rooted in the Constitution. See, *e.g.*, 3 Annals of Cong. 554 (1792) (Rep. Murray).

In the same fashion, respondents misconstrue (Br. 29-30) the Act of Feb. 28, 1795, ch. 36, 1 Stat. 424, when they assert (Br. 30) that it "applied only to insurrection." That claim ignores the plain language of the Act,[12] as well as this Court's recognition, not long after the enactment, that the Act of Feb. 28, 1795, "authorizes the President to call forth the militia to suppress insurrections, *and* to enforce the laws of the United States, in times of peace." *Martin* v. *Mott, supra*, 25 U.S. at 37 (emphasis added). Respondents are likewise in error in claiming (Br. 33-34) that under the Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, the Army and Navy could respond only to "resistance amounting to treason [or] to war" (Br. 34). Once more, respondents fail to address the text of the Act, which authorized the Army and Navy to be summoned not only "[i]n all cases of insurrection," but also "for the purpose of * * * causing the laws to be duly executed."

B. The Posse Comitatus Act Was Not Designed To "Restore" A "Constitutional Norm" Limiting The Use Of The Military To Cases Involving Insurrection Or Rebellion

1. Respondents acknowlege (Br. 79-80) that the language and structure of the Posse Comitatus Act do not, on their face, look much like a statutory articulation of a constitutional principle. They recognize (*id.* at 80) that the statute contains a "miscellany of narrowly specialized express authorizations" for the use of the military, and note that this "lends credibility to the view that the limitations on law enforcement use of the military are *merely* statutory, and not constitutional."[13] Respondents explain

[12] Section 2 of that Act is substantially identical to Section 2 of the Act of May 2, 1792.

[13] Respondents concede (Br. 94-96), in this connection, that in Title IX of the Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 905, 95 Stat. 1114-1116, Congress "expand[ed]" the

these characteristics of the Act, however, as a regrettable "shortfall * * * necessitated by political realities of that time" (Br. 79), and insist that the Posse Comitatus Act was nonetheless intended to "restore" what they propose as the "constitutional norm" restricting the use of the military to cases of insurrection. Respondents locate three passages in the legislative history to buttress that view of the statute, but none of them provides much support.

The quoted remarks by Representative Knott (Br. 67) do not, as respondents suggest, "allude particularl, to the Due Process clause"; they do not mention the Constitution at all. And far from characterizing the Act in constitutional terms, Representative Knott, in a portion of his remarks not quoted by the respondents, explained (7 Cong. Rec. 3847 (1878)) that the Act permitted the military to be used to enforce "the civil-rights bill" as well as "to protect the elective franchise."[14] Representative Mills *did* mention the Constitution, but only to explain why it would be unlawful for the military to obey a command to "disperse th[e] House of Representatives" (*id.* at 3849). Nowhere did Mills contend that the military could

military's authorization to participate in law enforecement. They insist (Br. 93-94), however, that in doing so "Congress carefully and emphatically reaffirmed the long-established view of the Posse Comitatus Act under which even 'passive' uses of the military are felonious." We do not understand how respondents' "active/passive" distinction relates to their earlier assertion that the military could be used only for "insurrections" as opposed to other forms of "disorder." In any event, as we showed in our opening brief (Br. at 26-30), the legislative history of the 1982 legislation demonstrates that Congress did not believe that the Posse Comitatus Act embodies *any* sort of constitutional limitation on the deployment of the military.

[14] Respondents note (Br. 75) that in the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 14, Congress authorized the deployment of the military to enforce federal civil rights, and they acknowledge that "this statute * * * ignores the essential distinction between 'insurrection' and all other disobedience to law" (Br. 75-76). They suggest (*id.* at 76) that the statute may accordingly be unconstitutional.

only be used to curtail insurrections; indeed, Mills proposed an amendment to the Posse Comitatus Act under which the Act would "not apply on the Mexican border or in the execution of the neutrality laws elsewhere on the national boundary lines" (*ibid.*). Finally, although Senator Merrimon expressed the view that the Constitution prohibits the use of the military "for the purpose of executing the law in the ordinary sense," he also offered, as an example of the legitimate use of the armed forces, "strikes of great magnitude" during which the Army had been called in "to suppress general resistance to the law and authority" (7 Cong. Rec. 4243).

2. Respondents also argue (Br. 62-67), somewhat inconsistently, that the Posse Comitatus Act "restored" a "constitutional norm" because, as they view it, the Act criminalized conduct for which a civil remedy already existed. They refer to "the consistent rule" of "*per se* liability for injuries done by domestic law enforcement use of the military" (Br. 65), and rely principally on this Court's decision in *Beckwith* v. *Bean*, 98 U.S. 266 (1878). But that case neither establishes nor even adverts to any such rule; indeed, it has no bearing on the issue at all.[15] The other cited cases are equally inapposite.[16] Indeed, in one of

[15] *Beckwith* involved an action for false imprisonment, in which the plaintiff alleged that he had been detained by military officers, without a trial, for nearly six months. After the plaintiff secured a favorable verdict, the officers appealed, claiming that the trial court had erroneously refused to admit deposition testimony establishing that the defendants had acted in good faith in arresting and imprisoning the plaintiff. The Court held that the testimony should have been admitted in mitigation of damages, and it therefore reversed and remanded for a new trial. See note 2, *supra*.

[16] See, *e.g.*, *McCall* v. *McDowell*, 15 F. Cas. 1235 (D. Cal. 1867) (No. 8,673) (held, military officers lacked the power to arrest the plaintiff where the President had not authorized the arrest); *Johnson* v. *Jones*, 44 Ill. 142 (1867) (held, military officers had no authority to arrest the plaintiff and hold him without charges or judicial process where there was no basis for imposing a regime of martial law).

those cases, the court expressly approved the deployment of the military where "[t]here were occasional disturbances, the draft was sometimes opposed, [and] the arrest of deserters resisted" (*Milligan* v. *Hovey*, 17 F. Cas. at 380 (D. Ind. 1871) (No. 9,605)). Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246 (1974) ("both federal and state laws plainly contemplate the use of force when the necessity arises").

CONCLUSION

It is common ground in this case that "the decison to invoke military power has traditionally been viewed with suspicion and skepticism" (*Scheuer* v. *Rhodes*, 416 U.S. at 246). But it is a broad leap from that general premise to respondents' assertion that the Constitution in general, and the Fourth Amendment in particular, incorporates special, unarticulated limitations on the deployment of military force. And it is even more implausible to suppose, as did the court of appeals, that the peculiar restrictions imposed by the Posse Comitatus Act may supplant a careful "balancing of competing interests" under the Fourth Amendment (*Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981) (citation omitted)).

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

BARBARA L. HERWIG
SCOTT MCINTOSH
Attorneys

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